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No.

In The Supreme Court of the United States

William D. Catoe, Commissioner, South Carolina Department of Corrections,

Petitioner,

vs.

Joseph Lee Ard,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court of South Carolina

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CAPITAL CASE
QUESTIONS PRESENTED

I.

The Supreme Court of South Carolina misapplied *Strickland v. Washington* when it concluded that trial counsel was ineffective in failing to interview and later cross-examine the State's gunshot residue expert. Counsel performed reasonable investigation into the matter by retaining a defense expert who reviewed the report, and, after the expert found no error in the report, concentrated their effort on showing how the material tested was not properly or sufficiently collected for accurate testing results, and explored other avenues of showing accident. The state court's ruling necessarily ignores the *Strickland* requirement of showing constitutionally deficient representation, and relegates review to arbitrary approval or disapproval of the method and manner of representation.

II.

The Supreme Court of South Carolina misapplied *Strickland v. Washington* when it failed to consider the overwhelming evidence of guilt in the record when determining prejudice of the purported error regarding the gunshot residue evidence. The state court concluded that the purported error in investigation and cross-examination would have prevented the State from attacking the defense theory as effectively as it did in the closing argument. Such a conclusion fails to consider the probable effect of the purported error in light of the totality of the evidence which is the proper standard under *Strickland*.

III.

The Supreme Court of South Carolina misapplied *Strickland v. Washington* when it considered an after trial change in reporting standards and a subsequently retained expert opinion who testified in the collateral litigation simply to a differing opinion on the gunshot residue test.

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INTRODUCTION TO THE PETITION

Petitioner, William D. Catoe, Commissioner of the South Carolina Department of Corrections, through the Attorney General of South Carolina, hereby petitions the Court for a Writ of Certiorari to review the decision of the Supreme Court of South Carolina which affirmed a grant of a new trial through post-conviction relief. The Supreme Court of South Carolina concluded relief was warranted as trial counsel rendered deficient representation in the investigation and challenge of the gunshot residue evidence in the instant case.

Petitioner asserts the state court misapplied *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in its evaluation of error and prejudice. This opinion, in a capital case, stands in stark contrast to the decisions of this Court which, if left uncorrected, creates an artificial division in the interpretation and application of this Court's precedent.

CITATION TO OPINION BELOW

The March 5, 2007 decision of the Supreme Court of South Carolina affirming the grant of state post-conviction relief entitling respondent, Joseph Lee Ard, ("Ard") to a new trial. is attached to the Petition as **Appendix I**. The opinion has been published as *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). For the convenience of the reader, Petitioner will refer to the attached copy of the opinion when referencing the state court's opinion.

JURISDICTION

The Supreme Court of South Carolina entered its opinion on March 5, 2007. Petitioner filed a Petition for Rehearing on March 20, 2007. The Supreme Court of South Carolina denied the petition on April 4, 2007. A copy of the order denying is

attached to the petition as **Appendix II**. Pursuant to Rule 13, Rules of the Supreme Court of the United States, this petition has been timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

This matter involves the Sixth Amendment to the United States Constitution which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defence."

STATEMENT OF THE CASE

A. Post-conviction Relief Procedural History.

On November 22, 2004, after an evidentiary hearing and full briefing, the Honorable J. Ernest Kinard granted a new trial based upon his conclusion that trial counsel was ineffective in failing to adequately investigate the reports concerning gunshot residue testing. The State filed a timely notice of intent to appeal. (App. p. 4678). On March 6, 2005, Petitioner, the State, presented the following issues in a Petition for Writ of Certiorari filed in the Supreme Court of South Carolina:

I.

> Did the state PCR court err as a matter of law in granting post-conviction relief concerning the failure of trial counsel to more fully investigate the reports concerning gun shot residue where counsel was not deficient and reasonably reviewed the SLED test report concerning the Gun Shot Residue testing on the victim's hands, and retained a former SLED agent to review the reports and provide advice and direction?

II.

Did the state PCR court err as a matter of law in finding 6th Amendment prejudice where the mere fact that some material found interesting by SLED agent Powell did not make it Gun Shot residue nor mean that the victim was ever holding a gun where the suggestion was refuted by other forensic evidence regarding the lack of a burn injury to the hand at the time of the shooting and the likelihood any of the particles could have come from "transferred contact" where the victim was in close proximity to the shooting which resulted in her death?

Ard made a response in opposition to the petition on July 6, 2005. The Supreme Court of South Carolina granted the State's petition for writ of certiorari on January 20, 2006. Additional briefing followed. On March 20, 2007, the Supreme Court of South Carolina entered its opinion affirming the grant of relief. Petitioner, the State, filed a Petition for Rehearing on March 20, 2007, which was denied on April 4, 2007.

B. Trial Procedural History.

On April 23, 1993, Joseph Lee "Jody" Ard shot his girlfriend, Madalyn Coffey, seventeen (17) years old, in the head. She was eight (8) months pregnant at the time of the shooting. Madalyn died as a result of the shooting. The fetus suffocated in the womb as a result. On September 7, 1993, Ard was indicted for the murder of Madalyn Coffey (count one) and the "murder of unborn child" (count two)(93-GS-32-2353).(App. pp. 3319-22).

Ard was represented by court-appointed counsel Elizabeth Fullwood and John E. "Jack" Duncan. A jury trial began April 15, 1996. The Honorable Marc H. Westbrook presided. On April

21, 1996, the jury found Ard guilty of both counts of murder. (App. p. 2539-40). On April 23, 1996, the sentencing proceeding began. On April 25, 1996, the jury unanimously found the existence of two statutory aggravating circumstances and recommended a sentence of death. (App. pp. 3309-13).

C. Direct Appeal Procedural History.

Ard filed a timely notice of appeal. Joseph L. Savitz, III, Deputy Chief Attorney of the South Carolina Office of Appellate Defense, represented Ard on appeal. Appellate counsel filed his final brief on March 25, 1998. On September 14, 1998, the Supreme Court of South Carolina entered an opinion affirming the conviction and sentence. *State v. Ard*, 332 S.C. 370, 505 S.E.2d 328 (1998). A petition for rehearing was filed on September 24, 1998, and denied on October 7, 1998. (App. pp. 3438-45). Ard did not seek certiorari in the United States Supreme Court.

D. Factual History as Included in the Direct Appeal.

The South Carolina Supreme Court summarized the factual history of the case as follows:

> Ms. Coffey died from a single gunshot wound to her forehead. Her unborn but viable child survived in utero for approximately six to eight minutes before dying from a lack of oxygen.
>
> During the guilt phase of trial, witnesses testified they heard appellant threaten to kill Ms. Coffey prior to the shooting. A witness testified she saw appellant assault Ms. Coffey during her pregnancy and heard appellant state he wished Ms. Coffey and the unborn child were dead.

> On the evening of the shooting, a witness testified she heard appellant and Ms. Coffey arguing in a motel bathroom. Appellant had a gun. Shortly thereafter, appellant shot Ms. Coffey. He told a friend, "tell them I did it and they will have to catch me." Appellant then left in his automobile. There were no eyewitnesses to the shooting.
>
> Appellant testified Ms. Coffey's death was an accident. He claimed Ms. Coffey, who was 8 1/2 months pregnant with his child, was upset and threatened to kill herself with the gun she was holding in her hand. During appellant's attempt to take the gun away from his girlfriend, the gun discharged. Appellant testified he thought his girlfriend was dead. He "freaked out" and fled to Atlanta. A friend informed appellant the police were looking for him. Three days later, appellant returned to Columbia and met with an attorney. Appellant testified he planned to surrender to the police but "blacked out" in the attorney's office. When he awoke, he was in the hospital. Ultimately, appellant was arrested for the two murders.

State v. Ard, 332 S.C. 370, 374-75, 505 S.E.2d 328, 330 (1998).

E. Ard's Defense Theory at Trial.

Ard testified as to his version of the shooting:

> A I told her she was acting crazy. I was on my knees. I was trying to lean forward to get it. She twisted like this (indicating). I said, "Give me the goddam gun, Madelyn." She turned real quick like that

(indicating) and I reached up to grab it and it went off.

Q Jody, when you reached for the gun, where did you grab it?

A She had it in her hand like this (indicating) and I grabbed it like that (indicating).

Q Like that (indicating)?

A Yes, ma'am.

Q So your hand was where?

A Around this area right here (indicating).

Q Around this cylinder gap?

A Yes, ma'am, like that.

(App. p. 2227, lines 11-25).

On cross-examination, Ard testified again that he had his hand around the cylinder, but when asked about burns or scarring, he responded "[i]t didn't leave a scar" only that his hand felt "numb" and he had "little marks but it's gone away." (App. p. 2262). The state offered evidence that if one would grab a gun around the cylinder when the gun is fired, there would be injury, including actual tearing of the skin. (App. pp. 2403-05).

F. Other Defense Evidence At Trial.

The defense called **Woodrow Poplin**, an expert in the field of civil and mechanical engineering. (App. p. 2302). He rendered an opinion, after reviewing the crime scene, about the

line of travel of the bullet, from where it struck the mobile home, back to the weapon's probable position. (App. pp. 2303-06). Poplin disagreed with the autopsy report that asserted a 30 degree angle or that the bullet went downward. (App. p. 2310).

The defense also called **Donald Girndt**, a private investigator who was formerly with SLED.[1] (App. pp. 2324-26). He was qualified as an expert in fingerprint identification, footwear, blood stain pattern interpretation, crime scene analysis, and crime scene photography. (App. p. 2328). He then opined that the body had been moved. (App. pp. 2339-40). He said that the movement at the scene prior to documentation of the evidence and the testimony caused him not to be able to determine accurate angles at the time of the blood letting and that he could not determine when gunshot residue samples were taken. (App. pp. 2344-45). He also noticed that the victim's hands were not bagged in the photographs to preserve evidence. (App. pp. 2352-53). Girndt conclusions were "inconclusive" based upon the discarding and inadequate documentation of the evidence. (App. p. 2353). He stated that it could have been an accident or it could have been a homicide. (App. pp. 2353-54).

G. Evidence at the PCR Hearing.

The South Carolina Supreme Court summarized the PCR evidence, in part, as follows:

> After filing for PCR, respondent deposed Powell, the SLED gunshot residue expert, in October 2001; Powell testified for the State at the PCR hearing in April 2004. At both the deposition and the hearing, Powell stated that his testimony at trial was based on the SLED protocol **in use at**

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[1] South Carolina Law Enforcement Division.

> **that time.** Based on this protocol, he accurately reported a finding of negative for gunshot residue. Powell explained that SLED's standard at the time was to report a positive conclusion of gunshot residue **only** if perfectly round gunshot residue particles were detected, which specifically meant spherical particles containing barium, antimony and lead. However, he further explained that as time went on, there were concerns that when non-round particles with the three required elements were found, or perfectly round lead particles were found, these findings should not be reported as a negative finding, but rather as "inconclusive."
>
> Regarding the instant case, he stated that if the analysis was conducted under the modern protocol, his conclusion would be that two particles on Coffey's right back hand were inconclusive for gunshot residue. Powell explained that an "inconclusive" finding meant it was not consistent with the person firing the gun, **but could be consistent with the person handling the weapon.**

(Petition Appendix, p. 7).

Also at the PCR hearing, collateral counsel for Ard secured an expert, Robert White, who essentially opined the material, included non-round particles, could be, in his opinion, considered gunshot residue. (See generally App. p. 3646-51). He also acknowledged that gunshot residue could have gotten on the victim's hands in a variety of ways including firing a gun, handling a gun, being close to a gun going off, or touching

something that had residue on it. (App. pp. 3652-52; p. 3685; p. 3837).

The PCR judge rejected Ard's claim of presentation of false evidence in regard to Agent Powell's report and found:

> Agent Powell's statement that the results from the test would now be considered 'inconclusive' is the result of a change in SLED protocol on reporting, *not a change of opinion as to the results of those tests*. Agent Powell's testimony is consistent with SLED reporting protocol in existence at the time of trial.

(App. p. 4661)(emphasis added).

REASONS CERTIORARI SHOULD BE GRANTED

I.

The South Carolina Supreme Court misapplied *Strickland v. Washington* when it concluded that trial counsel was ineffective in failing to interview and later cross-examine the State's gunshot residue expert. Counsel performed reasonable investigation into the matter by retaining a defense expert who reviewed the report, and, after the expert found no error in the report, concentrated their effort on showing how the material tested was not properly or sufficiently collected for accurate testing results, and explored other avenues of showing accident. The state court's ruling necessarily ignores the *Strickland* requirement of showing constitutionally deficient representation, and relegates review to arbitrary approval or disapproval of the method and manner of representation.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066 (1984). He or she must show not merely that counsel could have made different choices in representation, but that specific choices in representation "were outside the wide range of professionally competent assistance" in light of the facts and circumstances of his particular case. *Id. See also Williams v. Taylor*, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511 (2000). To be sure, "[t]here are countless ways to provide effective assistance in any given case." 466 U.S. at 689, 104 S.Ct. 2065. Importantly, reviewing counsel's performance is not an exercise to critique or "grade" counsel's performance, but a comprehensive analysis of whether real substantive error occurred in light of the surrounding circumstances. 466 U.S. at 697, 104 S.Ct. at 2069. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. *Id.* "Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced." *United States v. Gonzalez-Lopez*, ___ U.S. ___, ___, 126 S.Ct. 2557, 2563 (2006).

The South Carolina Supreme Court failed to follow this well established precedent, and granted relief on an arbitrary ground under the guise of a Sixth Amendment violation. Ard is not entitled to relief under federal law, and the grant of relief should not stand.

To understand the extent of the erroneous application of this Court's precedent, it is necessary to review the salient facts of record and those relied upon by the majority in reaching its opinion. *See generally Strickland*, 466 U.S. 698, 104 S.Ct. 2070

("the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"). The victim died from a "close range single gunshot wound to the left forehead that exited above the right ear so that the bullet traveled from left to right, s[l]ightly backwards and slight[ly] downwards." (App. p. 2021, lines 8-11). Ard's defense at trial was accident. Ard testified that victim had picked up the gun during a domestic dispute, Ard grabbed the gun and attempted to take it from the victim, and the gun discharged. (Petition Appendix, p. 4). (See also App. p. 2226, line 1 - p. 2228, line 13). The state's gunshot residue expert testified at trial that "several particles" on the victim's hands "were very interesting, but there was not any or enough material for us to be able to call gunshot residue," and, that had the victim "fired the weapon, the material that would have come from this gun would have had to have been removed before the test would have been administered" to avoid a positive result. (Petition Appendix, p. 3). The majority noted that evidence at the PCR hearing established that a *subsequent* (after trial) change in state agency reporting protocol would now require the report to reflect an "inconclusive" result, but the opinion remained the same that the results would still not be consistent with the victim firing the gun. (Petition Appendix, p. 7). As far as counsel's investigation, the record established that counsel hired a former supervisor at the state agency to review the gunshot residue report for the defense. When the former supervisor advised counsel there was "'nothing for [counsel] to question,' in the gunshot residue tests, they tried to develop theories as to why [... the victim...] did not have gunshot residue on her hands, such as the way this evidence was collected and preserved." (Petition Appendix, p. 9). Trial counsel testified that he did not cross-examine the state's expert as he did not wish to highlight the deficiency in the defense. (Petition Appendix, p.

9).[2] The majority concluded that "trial counsel should have further investigated and more throughly challenged the gunshot residue evidence." (Petition Appendix, p. 12). The majority omitted from the recitation of facts, however, that the PCR judge specifically found the "inconclusive" designation "is the result of a change in SLED protocol on reporting, *not a change of opinion as to the results of those tests*." (App. p. 4661)(emphasis added). Further, though the majority noted that counsel investigated the way the material was collected, (Petition Appendix, p. 9), the state court omitted from the recitation of facts (and apparently from consideration), that counsel also presented a crime scene investigator, and an engineer to consider the bullet trajectory, in order to corroborate Ard's version of events and the defense of accident, (App. pp. 2302-2311; pp. 2324-2354), and presented witnesses to establish, contrary to the state's case, that victim and Ard enjoyed a happy relationship, (See App. pp. 2127-2137; p. 2163). The majority did acknowledge that the jury heard from the state expert that he had detected, in his examination, several "interesting" particles on the victim's hands, but the material was not sufficient to be positive for gunshot residue. (Petition Appendix, p. 3).

It is evident from even the most cursory reading of the South Carolina Supreme Court opinion that the facts of this case simply do not meet this Court's definition of *Strickland* error. The Chief Justice of the South Carolina Supreme Court, Chief

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[2] The record shows that defense counsel replied, "No questions," after Agent Powell initially testified. (App. p. 1941, lines 14-15). However, Agent Powell was recalled after the defense case, and questioned about injury if one would grip a gun around the cylinder when the gun was fired. Defense counsel then cross-examined the agent at that time, and included questions that highlighted the fragility of the gunshot residue material and the possible removal of material by moving the body at the scene. (App. p. 2405, line 24 - p. 2407, line 18).

Justice Toal, in the well-reasoned dissent, joined by Justice Burnett,[3] specifically and concisely identified the facts supporting counsel's reasonable representation and the majority's clear error in finding to the contrary:

> In preparation for trial, Ard's counsel did, in fact, hire their own gunshot residue expert to review the gunshot residue test results furnished by the State. Counsel did not ultimately produce this expert as a witness at trial because, upon review of the test results, the expert then indicated to trial counsel that he concurred with the State's expert's conclusion. Instead, at trial, the State called the expert originally obtained by Ard to testify that he had agreed with the State's own expert finding. In my opinion, Ard's trial counsel appropriately countered this testimony with a cross-examination which called into question the accuracy of the gunshot residue test results. Specifically, counsel elicited testimony from the expert suggesting that the process of fingerprinting the victim would have "interfered" with the gunshot residue test results if done prior to trace evidence collection. Simply stated, Ard's trial counsel sufficiently dealt with the adverse evidence. The fact that Ard's counsel could not force their own qualified expert to tailor his opinion to fit their theory of the case, in my view, is an insufficient basis on which to conclude that these counsel were deficient.

(Petition Appendix, p. 16).

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[3] Petitioner notes the slim majority. The Supreme Court of South Carolina is comprised of five members.

The dissent is correct. There is no error.

While the state court found counsel was ineffective when counsel failed to cross-examine the agent to elicit the fact that the "interesting" particles were "not inconsistent with [... the victim...] handling a gun," (Petition Appendix p. 13); as the dissent alludes to, such a conclusion is necessarily at odds with the inescapable fact that such evidence would still not corroborate Ard's specific version of the shooting. This creates a tension in the record that simply cannot properly resolve in favor of relief under federal law. To be entitled to relief under federal law:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

Here, there could be no constitution error as there could be no reasonable probability that any error in failing to pose such a question could reasonably be considered to have affected the result of the proceeding such as would undermine confidence in the outcome. *Id. See also Gonzalez-Lopez, supra.* Ard testified at his trial, not just that the victim could have touched the gun, but that she held the gun, put it to her own head, and the gun fired while his hand was around the cylinder gap. (App. p. 2227). It has not been questioned that the victim, under the scenario advanced by Ard, would have had gunshot residue on her hands. (App. p. 1940). This is the version of events counsel had to work with, and, under a proper application of federal law, counsel's actions were completely reasonable in light of their client's expressed version of the shooting:

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland, 466 U.S. at 691, 104 S.Ct. at 2066 (emphasis added).

Yet, the majority found, contrary to the guidance of *Strickland*, that "counsel's decision to not cross-examine [... the state's expert...] on the gunshot residue evidence was not an objectively reasonable strategy." (Petition Appendix, p. 13). The state court concluded that cross-examination would have supported the defense. Id. The logic falls short of the finish, though, as the ultimate conclusion of "no positive result for gunshot residue" was consistent. No matter how clever the question, the state expert would not, indeed could not, have said the test was positive for gunshot residue. Therefore, counsel had to account for the suggestion, in the absence of a positive gunshot residue test, that victim's hands *were not on the gun at the time the gun fired* which was critical to Ard's version of the events. (App. pp. 3712-13). (See also Petition Appendix, p. 8 (majority noted that counsel admitted the gunshot residue test undermined the accident defense)). The state court failed to account for the fact that counsel would still have to explain the absence of a positive finding, because the evidence would not support the defense version of events if there was not a positive finding. [4]

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[4] Moreover, the majority opinion omits the remainder of the would-be testimony, which would have been the particle evidence could also show merely that the victim was "shot at" *because the levels were low*. (App. p. 3810).

Consequently, the state court's ruling, instead of properly applying the error and prejudice test of *Strickland*, actually reflects an arbitrary grant of relief. Ard is not entitled to relief under a proper application of federal law, and the grant of relief should not stand.

Further, the state court, in reaching its conclusion, relied on two subsidiary findings to support the flawed conclusion that counsel was constitutional ineffective in failing to cross-examine the witness. These findings again show a misapprehension and misapplication of federal law, and do not support the majority's conclusion.

A. The state court erroneously suspended *Strickland's* requirement that respondent must prove prejudice in regard to counsel's choice of expert allowing instead a presumption of error in concluding counsel was deficient for retaining an expert who was the state's expert's former supervisor.

In finding error, the state court found fault with counsel's choice of expert. The expert retained had formerly supervised the state's expert, and had reviewed the agent's work in this matter. (Petition Appendix, p. 12). The majority admittedly found "no evidence" in the record that the expert "rendered a biased opinion." Id. Yet, the majority concluded it was unreasonable to retain the expert given his past connection. Id. However, as more fully discussed above, under either old or new reporting protocol, there is no positive finding for gunshot residue according to the state's expert. In fact, Ard's claim in PCR of false evidence was soundly *rejected* by the PCR judge, who found, in part, the later "inconclusive" label "is the result of a change in SLED protocol on reporting, *not a change of opinion*

as to the results of those tests." (App. p. 4661)(emphasis added). In short, there was, admittedly, no evidence of prejudice.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88, 104 S.Ct. at 2064. *See also Williams v. Taylor*, 529 U.S. 362, 394-95, 120 S.Ct. 1495, 1514 (2000)(noting with approval that "petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice"); *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S.Ct. 2574, 2586 (1986)("defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy"). Further, as part of this burden, a defendant must show not only error, but that the complained of error "actually had an adverse effect on the defense" to be entitled to relief under *Strickland*. 466 U.S. at 693, 104 S.Ct. at 2067. This Court has reserved assumption of prejudice for the rare case of denial or absence of counsel. *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984). *See also Florida v. Nixon*, 543 U.S. 175, 179, 125 S.Ct. 551, 555 (2004); *Bell v. Cone*, 535 U.S. 685, 697, 122 S.Ct. 1843, 1851 (2002). The state court simply could not, under federal precedent, presume prejudice in connection with the allegation of ordinary counsel error, yet this court did.[5] This is especially troubling where the

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[5] This same state supreme court assumed prejudice in another capital case which was reversed by this Court in *Ozmint v. Nance*, 543 U.S. 1043, 125 S.Ct. 868, 869 (2005), for reconsideration in light of the Court's decision in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551 (2004). On remand, the state supreme court issued another opinion finding Nance's case:

> ...represents one of the rare cases where counsel

majority actually admits that no evidence of bias is in the record, and the facts show no error or misstatement, under then existing reporting protocol, in the state expert's opinion. [6]

When precedent is correctly applied, the issue is whether counsel acted reasonably. It should not be whether another expert exists, who should have been located, who would have opined differently, as the dispositive issue. "The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness." *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.), *cert. denied* 525 U.S. 1012 (1998). The Fourth Circuit has consistently found there is no such rule. *See, e.g., Fisher v. Angelone*, 163,

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> 'entirely fails to subject the prosecution's case to meaningful adversarial testing."

Nance v. Ozmint, 367 S.C. 547, 553, 626 S.E.2d 878, 881 (2006)(emphasis in original).

The state supreme court then block quoted, and incorporated into the opinion granting relief, its previous findings that, in the court's view, detailed individual counsel deficiencies, even while acknowledging it would continue to presume prejudice under *Cronic* and *Nixon* in that case. *Id.*

[6] This also makes extremely curious the state court's citation to a Florida District Court's case, *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D.Fla. 1986), when that case is based on a showing that testimony regarding the gunshot residue evidence was either false or misleading, and whether counsel should have discovered same. Comparison of this case to *Troedel* merely highlights the misapplication of federal law in the instant case.

F.3d 835, 853 (4th Cir. 1998), *cert. denied* 526 U.S. 1035 (1999). Other federal courts have also refused to consider such claims, especially noting that the arguments essentially boil down to a battle of experts requiring courts to weigh in on successive, often multiple, opinions: "such battles of psychiatric opinions during successive collateral challenges to a death sentence would place federal courts in a psycho-legal quagmire resulting in the total abuse of the habeas process." *Harris v. Vasquez*, 949 F.2d 1497, 1518 (9th Cir. 1990), *cert. denied* 503 U.S. 910 (1992); *Silagy v. Peters*, 905 F.2d 986, 1013 (7th Cir.1990), *cert. denied*, 498 U.S. 1110 (1991)(after denying the viability of the claim in habeas, the court noted it wished to avoid "a never-ending battle of psychiatrists appointed as experts for the sole purpose of discrediting a prior psychiatrist's diagnosis."). Though the referenced cases specifically discuss psychiatric opinions, the concept is the same - - a battle of experts. As the court in *Waye v. Murray*, 884 F.2d 765, 766-67 (4th Cir.), *cert. denied* 492 U.S. 936 (1989), noted, "it will nearly always be possible in cases involving the basic human emotions to find one expert witness who disagrees with another and to procure an affidavit to that effect..." Such procured disagreement, however, does not show counsel error.

Simply, counsel is "not required to shop for a more favorable expert," *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir.), *cert. denied* 539 U.S. 950 (2003), or one who will testify exactly as counsel prescribes. *See Wilson v. Green*, 155 F.3d 396, 403 (4th Cir.), *cert. denied* 525 U.S. 1012 (1998)(it is not require of counsel to second guess reports contrary to a hoped for position). Stated differently, the "failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance." *Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003), *cert. denied* 541 U.S. 947 (2004). *See also Winfield v. Roper*, 460 F.3d 1026, 1041 (8th Cir. 2006)("Counsel is not required to shop for experts who will testify in a particular way."); *Dowhitt v. Johnson*, 230

F.3d 733, 748 (5th Cir. 2000), *cert. denied* 532 U.S. 915 (2001)("under the circumstances, trial counsel was not deficient by not canvassing the field to find a more favorable defense expert").

Further, in this case, the state supreme court essentially holds that counsel cannot simply rely on his expert, but must independently investigate the expert's area of investigation i.e. personally question the state's expert. (Petition Appendix, pp.12-13). This circular logic undermines any confidence in the state court's conclusion. Counsel has the right to rely on the opinion of experts. *Lewis v. Alexander*, 11 F.3d 1349, 1353 (6th Cir. 1993)("An attorney is entitled to rely on a professional of established skill and reputation in formulating judgments necessary to trial preparation."). *See also Vinson v. True*, 2005 436 F.3d 412, 419-20 (4th Cir. 2006)(upholding the lower court's finding that "reliance on the defense expert's advise did not violate the performance prong of Strickland."). Again, the record simply cannot support the grant of relief based on federal law.

B. The state court also erroneously suspended *Strickland's* requirement that respondent must prove constitutional error relying instead on ABA guidelines as a definitive measure of effective representation.

Lastly, to the extent the court relies on the *American Bar Association Guidelines For The Appointment and Performance of Defense Counsel in Death Penalty Cases*, the 2003 revision for evaluation of representation for this 1993 murder and 1995 trial, to find not only is investigation required, but certain steps, such as interviews with potential witnesses, *must* be followed, the state court again misapprehends and misapplies this Court's precedent. The majority quotes the guidelines as support that failure to interview or failure to retest evidence is *per se* ineffective. (Petition Appendix, p. 11). This simply ignores all the Court's

prior holdings that consistently recognized, as the dissent in this case did, (Petition Appendix, p. 24, n.19), that reasonableness of investigation is case specific and does not require adherence to a checklist of required steps:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2065

This Court has repeated the "guides" designation in regard to these standards in several of its most recent cases. *See Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456 (2002); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003). Nothing suggests a departure from the *Strickland* rule. There are no specific steps, requirements, or forms to follow by rote as a pre-condition to finding counsel provided effective representation. *Strickland, supra.* Constitutional error may only be found, according to this Court's precedent, where one who is challenging the conviction shows error and prejudice. *Id. Gonzalez-Lopez, supra.* Again, Ard is not entitled to relief under federal precedent. The grant of relief should be reversed.

In sum, the state court misapplied *Strickland* in finding counsel was constitutionally ineffective as the record fails to support error, or if error, fails to support prejudice. However, the state court also made two specific and significant errors in

evaluating and concluding prejudice which are addressed in the following two issues.

II.

> The South Carolina Supreme Court misapplied *Strickland v. Washington* when it failed to consider the overwhelming evidence of guilt in the record when determining prejudice of the purported error regarding the gunshot residue evidence. The state court concluded that the purported error in investigation and cross-examination would have prevented the State from attacking the defense theory as effectively as it did in the closing argument. Such a conclusion fails to consider the probable effect of the purported error in light of the totality of the evidence which is the proper standard under *Strickland*.

As demonstrated above, establishing that the victim could have handled a weapon does not support Ard's testimony that clearly placed the gun in the victim's hand when it was fired, or explain why gunshot residue, which would have been present under such a scenario, was not detected. In short, if counsel's representation was deficient, it could only be inconsequential given the static result in regard to a lack of a positive test. But that is not the only error the state court made in applying this Court's precedent. The state court also failed to consider the purported error in light of the whole record.

"In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069. Instead of considering the record as a whole, the majority emphasized the effect of the alleged error in isolation, most specifically its probable effect on closing argument:

> Respondent clearly showed that counsel could have established that while there was a scientific finding of "no gunshot residue," there nevertheless was evidence consistent with (but not conclusive of) Coffey handling the gun. Had counsel elicited this testimony from Powell, the State would not have been able to attack the defense theory as convincingly as it did.
>
> ...
>
> The State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice.

(Petition Appendix I, p. 14).

The "errors" complained of simply do not show the resulting prejudice required under *Strickland* to entitle Ard to relief:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. United States v. Valenzuela-Bernal, 458 U.S. 858, 866-867, 102 S.Ct. 3440, 3446-3447, 73 L.Ed.2d 1193 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693, 104 S.Ct. at 2067 (1984).

The majority's consideration of prejudice is flawed by its myopic approach. Other, uncontested, evidence rendered Ard's version of events untenable. Specifically, Ard testified he gripped the gun around the cylinder, yet the evidence showed no damage

to the skin that would have had to have occurred to corroborate this important portion of Ard's testimony. If Ard had indeed grabbed the cylinder as described, there would have been injury, including actual tearing of the skin. (App. pp. 2403-05). Ard admits that he had no such injury. (App. p. 2262). Additionally, as the dissent points out: "The State presented twenty witnesses to show that Ard killed the victim with malice. Although the State emphasized the lack of gunshot residue in its closing argument... the State presented other overwhelming evidence from which a jury could find Ard guilty of murder." (Petition Appendix, p. 18). [7]

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6 Petitioner refers to facts as reflected in the prior opinion of the state supreme court, when that court affirmed the conviction on direct appeal:

> During the guilt phase of trial, witnesses testified they heard appellant threaten to kill Ms. Coffey prior to the shooting. A witness testified she saw appellant assault Ms. Coffey during her pregnancy and heard appellant state he wished Ms. Coffey and the unborn child were dead.
>
> On the evening of the shooting, a witness testified she heard appellant and Ms. Coffey arguing in a motel bathroom. Appellant had a gun. Shortly thereafter, appellant shot Ms. Coffey. He told a friend, "tell them I did it and they will have to catch me." Appellant then left in his automobile. There were no eyewitnesses to the shooting.
>
> Appellant testified Ms. Coffey's death was an accident. He claimed Ms. Coffey, who was 8 1/2 months pregnant with his child, was upset and threatened to kill herself with the gun she was holding in her hand. During appellant's attempt to take the gun away from his girlfriend, the gun discharged.

When viewed in light of the whole record, there is no basis for finding prejudicial error. Again, the state court misapplied this Court's precedent.

III.

> The state supreme court misapplied *Strickland* when it considered an after trial change in reporting standards and a subsequently retained expert opinion who testified in the collateral litigation simply to a differing opinion on the gunshot residue test.

This Court has long held that "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 446 U.S. at 690, 104 S.Ct. at 2066.

State v. Ard, 332 S.C. 370, 374-75, 505 S.E.2d 328, 330 (1998).

The state court also acknowledged that "[d]uring the sentencing phase, Lance Black, an inmate at McCormick Correctional Institute, testified as a hostile witness for the State. Black testified while appellant was incarcerated at McCormick before trial, appellant told him he had 'planned' the accident defense. According to Black, appellant told him he had killed Ms. Coffey because she was going to turn him into the police, presumably for drug offenses." 332 S.C. at 379, 505 S.E.2d at 332 .

Here, though there is reference to reliance on the evidence available at the time of trial, there is no doubt the state court considered the testimony of a subsequently retained expert who would opine consist with the defense, in simple disagreement with the state expert.[8] Petitioner notes the majority writes, "[t]he PCR court's findings are based *almost exclusively* on Powell's [i.e. the state gunshot residue expert] testimony as to what information he would have provided to counsel if only they had asked - either prior to trial or on cross-examination." (Petition Appendix, p. 15). To base even part of the decision on the subsequent change in protocol, or finding of a favorable expert years after trial, is simply plainly contrary to this Court's precedent. *Id. See also Bell v. Cone,* 535 U.S. at 698, 122 S.Ct. at 1852; *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667 (1986)(repeating *Strickland*'s direction to view counsel's actions "from counsel's perspective at the time"). Moreover, as the dissent noted:

> ...the fact that eight years later, PCR counsel were finally able to retain an expert who reached a conclusion favorable to Ard's case (i.e. that the victim's hands contained traces of gunshot residue) does not imply that trial counsel were deficient for failing to find such an expert at the time of his trial. To hold otherwise declares open season on the criminal justice system by giving a "second chance" to any convicted criminal who is patient enough to seek out an "expert" who will

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[8] Petitioner again notes the wealth of authority that supports that counsel is not ineffective for failing to obtain an expert to testify as he would so direct. *See, e.g., Winfield v. Roper*, 460 F.3d 1026, 1041 (8th Cir. 2006)("Counsel is not required to shop for experts who will testify in a particular way.")

> one day provide him with the opinion testimony he desires.

(Petition Appendix, p. 17).

Not only is reliance on subsequent changes in protocol, or the eventual finding of another expert who agrees with the defense, plainly contrary to the parameters of the *Strickland* test, the obvious danger is the very real inevitability of unending litigation based on the creativity of collateral counsel and the mere passage of time with its inevitable change. To dispense with the time restriction is to invite ceaseless litigation. Again, the state court has misapprehended and misapplied federal law to grant relief in the instant case. The grant of relief should be reversed.

CONCLUSION

In sum, the state court misapprehended and misapplied *Strickland v. Washington* in the instant case. Particularly troubling is the state court's presumption of prejudice in regarding to the expert, which is a clear misapplication of federal law. Further, the conclusion that relief is warranted is based on arbitrary review of the method and manner of representation as opposed to the required showing of error and prejudice. These are significant legal errors in a capital case which is likely to be cited repeatedly for the erroneous application of this Court's precedent. Petitioner respectfully urges the Court to grant certiorari to review the judgment of the Supreme Court of South Carolina.

Respectfully submitted,

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June 28, 2007.
Columbia, South Carolina.

APPENDIX I

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Joseph Lee Ard, Respondent,

v.

William D. Catoe,
Commissioner, South Carolina
Department of Corrections,
Petitioner.

ON WRIT OF CERTIORARI

Appeal From Lexington County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 26282

Submitted September 20, 2006 – Filed March 5, 2007

AFFIRMED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Melody J. Brown, all of Columbia, for Petitioner.

William N. Nettles, of Sanders & Nettles, of Columbia, and Christopher Seeds, of New York, for Respondent.

JUSTICE WALLER: We granted the State's petition for a writ of certiorari to review the grant of post-conviction relief (PCR) to respondent, Joseph Lee Ard, who was sentenced to death for killing his pregnant girlfriend, Madalyn Coffey, and their unborn son. We affirm the PCR court's grant of a new trial based on ineffective assistance of trial counsel.

FACTS

On April 23, 1993, at approximately 5:30 a.m., Coffey died from a single gunshot wound to her forehead. She was 17 years old and 35 weeks pregnant at the time; the viable fetus died from a lack of oxygen. There were no eyewitnesses to the shooting. Respondent was tried for two counts of murder.

During the guilt phase of trial, the State presented over 20 witnesses. Witnesses for the State testified they heard respondent threaten to kill Coffey and that he told Coffey he wished she and the baby were dead. Respondent's friend, Jay Johns, testified that he was with respondent and Coffey in the trailer just before the shooting, but had gone outside "to get a beer" when he heard "a pop." Johns went back inside the trailer; when Johns asked respondent what happened, he said "I think I killed her." Johns called 911, and respondent fled the scene.[1]

SLED agent Joseph Powell testified for the State as an expert in gunshot residue analysis. Two types of samples, alcohol swabs and scanning electron microscope (SEMS) tabs, had been taken from Coffey's hands. Powell stated that he first "ran the swabs ... to see if we could find any amount, any elevated elements of materials. The elements we are looking for are materials call[ed] barium, antimony and lead." Powell explained that these are the three elements which are found in gun primer residue. Powell testified that after the initial test on the swabs was complete,

"[t]he values were not sufficient for a positive cause that there was gunshot residue, but there was **an indication**." (Emphasis added).

Therefore, Powell ran the SEMS test to see if there were "any actual physical particles that would have been found from gunshot residue." Powell stated that there were "several particles which were **very interesting**, but there was not any **or enough** material for us to be able to call gunshot residue; thus, [Coffey] ha[d] no gunshot residue on her hands." (Emphasis added). The following colloquy then occurred:

Q. When you say no gunshot residue on her hands, can you rule out her having pulled the trigger on that gun?

A. There is no gunshot residue on her hands. If she had fired the weapon, the material that would have come from this gun would have had to have been removed before the test would have been administered.

Trial counsel did not cross-examine Powell.[2]

Former SLED Agent Michael Avery also testified regarding gunshot residue. Avery stated that he was Powell's supervisor when the samples in this case were tested.[3] Avery stated he reviewed Powell's examination and confirmed Powell's conclusions. In addition, the State elicited the following testimony:

Q. As a matter of fact, the defense has since hired you to review that?

A. Yes, sir.

Q. Again. And you still confirm Joe Powell's conclusions?

A. Yes, sir, the conclusion of the test results, which was no gunshot residue.

The defense at the guilt phase put up over 10 witnesses. Several defense witnesses testified that respondent was excited about becoming a father and respondent and Coffey acted like they loved each other.[4] There was also testimony respondent did not threaten or abuse Coffey and that he was planning on getting a ring for, and marrying, Coffey.

Respondent took the stand in his own defense and testified Coffey's killing was an accident. He explained that he and Coffey were in a motel bathroom while Johns and his girlfriend were fighting in the motel room. Coffey was upset and crying because respondent had been spending time in Atlanta with another woman. When Johns and respondent went to leave the motel room, Coffey asked if she could go with respondent; he agreed. Johns, respondent, and Coffey then left the motel room and drove to Johns' trailer. Respondent testified that Coffey sat on the couch while he kneeled on the floor. When respondent told Coffey he was going to Atlanta the next day and she could not go with him, respondent stated that Coffey "got real upset." Respondent testified that Coffey had his gun in her hand and told him she did not love him. When respondent denied he was going to Atlanta to be with the other woman named Maurer, Coffey said "You're lying. You just want to go down there and screw Maurer some more. You don't love me or the baby. We might as well be dead." Respondent testified that she then pulled the hammer back on the pistol, cocking the gun.[5] According to respondent, he tried to lean forward to grab the gun, Coffey "turned real quick" and when he grabbed the cylinder gap of the gun, "it went off."

Coffey fell over. Respondent tried to pick her up, got "stuff and blood" on his hands, "freaked out" and fled to Atlanta. After three days of taking pills, sleeping, and crying,[6] respondent returned to Columbia with the gun, and his parents took him to an

attorney. As they were making arrangements in the attorney's office to turn respondent in to the Lexington County Sheriff's Department, he "blacked out" and woke up in the hospital.

In the State's closing argument, the State argued that respondent killed his victims with malice. Specifically, the State argued to the jury that the gunshot residue tests were important, and because there was no residue on Coffey's hands, respondent's accident defense did not hold up:

> ...Why are these so important? Because if there is no gunshot residue on her hands, as Joe Powell told you, then her hand wasn't on that gun when it went off. Her hand wasn't near that gun when it went off. Her hands were somewhere aside from on this gun.
>
> That's why they are so important. They can't attack Joe Powell. They can't attack him because their own expert, Mike Avery, was hired by the defense to review Mr. Powell's work.
>
> [Objections by defense, which were overruled.]
>
> ...He found no fault with Joe Powell's findings, that those findings were correct.
>
> Now, if the findings are correct, if the findings from these are correct, then the only thing they can do is attack the way it's collected. If they can't attack the results, they have got to attack the way it's collected.[7]
>
> ...
>
> Why is it so important that these tests be discounted? Because if they can't discount Joe Powell, if they can't discount those tests, then they can't get past the fact that there is no residue and then everything else they have

> raised is absolutely irrelevant, everything.... They have got to – got to – discount the value of those tests.
>
> ...No gunshot residue. None. What does that tell y'all? What does that tell y'all?

In addition to murder, the trial court charged the jury on involuntary manslaughter and accident. After one hour of jury deliberations, the jury requested a "definition of" involuntary manslaughter and murder; the trial court recharged the jury on those two offenses. After another 45 minutes of deliberation, the jury found respondent guilty of the murder of Coffey and the unborn child. After a lengthy sentencing phase with numerous witnesses for both sides, the jury returned a recommendation of death.

Respondent appealed, raising four issues related only to the sentencing phase. This Court affirmed the death sentence.[8] State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) (Moore, J., concurring in separate opinion in result only; Gregory, A.J., concurring in majority opinion in result only).

Respondent filed for PCR. The PCR court found that trial counsel had failed to adequately investigate and challenge the State's gunshot residue evidence and therefore granted respondent a new trial based on ineffective assistance of counsel.[9]

ISSUE

> Did the PCR court err in finding ineffective assistance of counsel based on trial counsel's failure to adequately investigate and challenge the State's gunshot residue evidence?

DISCUSSION

The State argues the PCR court erred in finding ineffective assistance of trial counsel. Specifically, the State argues trial

counsel were not deficient because they reasonably investigated the gunshot residue evidence by hiring former SLED agent Avery as a gunshot residue expert and reasonably relying on Avery's advice. The State further argues that even assuming deficiency, there is no prejudice. We disagree.

We find the PCR court's factual findings regarding deficiency and prejudice are well supported by the evidence presented at the PCR hearing. A review of the relevant evidence is in order.

After filing for PCR, respondent deposed Powell, the SLED gunshot residue expert, in October 2001; Powell testified for the State at the PCR hearing in April 2004. At both the deposition and the hearing, Powell stated that his testimony at trial was based on the SLED protocol **in use at that time**. Based on this protocol, he accurately reported a finding of negative for gunshot residue. Powell explained that SLED's standard at the time was to report a positive conclusion of gunshot residue **only** if perfectly round gunshot residue particles were detected, which specifically meant spherical particles containing barium, antimony and lead. However, he further explained that as time went on, there were concerns that when non-round particles with the three required elements were found, or perfectly round lead particles were found, these findings should not be reported as a negative finding, but rather as "inconclusive."

Regarding the instant case, he stated that if the analysis was conducted under the modern protocol, his conclusion would be that two particles on Coffey's right back hand were inconclusive for gunshot residue. Powell explained that an "inconclusive" finding meant it was not consistent with the person firing the gun, **but could be consistent with the person handling the weapon**.[10]

Even more significant, however, was Powell's testimony that had respondent's counsel cross-examined him at trial regarding his statement that "several particles ... were very interesting," he

would have testified that although the evidence from Coffey's hands did not meet SLED's threshold for positively identifying it as gunshot residue, the evidence could have been associated with gunshot residue.[11] Furthermore, Powell stated that if defense counsel had met with him prior to trial to discuss the test results, he would have explained what he found "interesting" about them. In other words, if counsel had asked, **either prior to trial or at trial**, Powell would have explained that the evidence from Coffey's hands, which revealed at least two particles with the three required elements, was consistent with gunshot residue and could have come from her handling a weapon.

Trial counsel Jack Duncan and Elizabeth Fullwood both testified at the PCR hearing. Both attorneys testified there was an extreme delay in receiving the requested discovery materials from the solicitor's office.[12] These discovery materials included the gunshot residue test results analyzed by Powell and dated October 1993. They did not receive the underlying "raw data" for the gunshot residue tests until March 1, 1996 after making a specific additional request for the data. Duncan testified that receiving the "no gunshot residue" finding in February 1996 created "a big hole in [the] theory of the case" which was accident. Likewise, Fullwood testified that respondent had a "good defense" to the guilt phase until the gunshot residue tests undermined the accident defense; Fullwood and Duncan both stated that they could not explain why Coffey did not have gunshot residue on her hands. According to Duncan, the prosecution "exploited" this "hole" to argue in closing that respondent's version of events could not have happened.

As to retaining Avery, Powell's former SLED supervisor, as a defense expert, Fullwood testified Avery was hired "[t]o see if he could help us understand and explain the results of the gunshot residue tests SLED had conducted."[13] Duncan testified that after Avery told them there was nothing "useful," i.e., "nothing for [counsel] to question," in the gunshot residue tests, they tried

to develop theories as to why Coffey did not have gunshot residue on her hands, such as the way this evidence was collected and preserved. Counsel did not request that Avery independently re-test the gunshot residue evidence.

Duncan further testified that counsel did not cross-examine the State's witnesses related to the gunshot residue test results because they "didn't want to draw any more attention to it" since they "had no response to what they had to say." When Duncan was asked about Powell's deposition testimony which showed Powell would have testified in a manner favorable to the defense if counsel had asked him certain questions, Duncan acknowledged that "the answers would have helped [the defense] immensely."

Finally, respondent presented his own gunshot residue expert at the PCR hearing, Robert White. In contrast to Powell, White **positively** identified several particles of gunshot residue from Coffey's tests. In White's opinion, as long as a particle contains the three required elements (barium, antimony, and lead) and is round-ish in shape (as opposed to crystalline, or spiky), then the particle constitutes unique gunshot residue. In addition, White found several particles "characteristic of gunshot residue," which he defined as "other particles of lead, barium and antimony in combinations of two or alone." White testified a person could get unique and characteristic particles from picking up a gun, firing a gun, or being close to a gun going off.

The PCR court ruled that trial counsel's failure to adequately evaluate and challenge the State's gunshot residue testimony was deficient performance that resulted in prejudice to respondent. As to deficiency, the PCR court concluded trial counsel failed to: (1) "aggressively re-examine" the gunshot residue reports; (2) "read the documents, evaluate them, and pursue the necessary next steps, such as consulting an appropriate," i.e., "an independent expert;" and (3) "investigate the possibility of retesting the samples." As to prejudice, the PCR court found that the "extent

to which the jurors credited Powell's testimony ... was critical to the outcome of the case." Moreover, the PCR court noted that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case.... Because of the solicitor's critical reliance on the absence of gunshot residue evidence, there is little question that the tenor of the jury deliberations would have been different, but for counsel's mistakes." Finally, the PCR court stated it was not "confident that a jury, adequately informed, would have convicted [respondent] of murder."

The State first argues the PCR court erred because respondent has not proved trial counsel was deficient. The State contends that counsel reviewed SLED's gunshot residue report and consulted with an expert. According to the State, because the expert reported he was satisfied with the report, counsel then reasonably focused their strategy on attacking the way the evidence was collected. In addition, the State maintains there could be no prejudice. We disagree.

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. E.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). The Court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. E.g., Strickland v. Washington, 466 U.S. 668 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial

would have been different. Strickland v. Washington, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Furthermore, when a defendant's conviction is challenged, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Strickland v. Washington, 466 U.S. at 695.

Without a doubt, "[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986); see also Strickland v. Washington, 466 U.S. at 691. When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. at 690. Moreover, while the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla. 1986), aff'd, 828 F.2d 670 (11th Cir. 1987) (emphasis in original).

The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case: "Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issues of both guilt and penalty." *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003) (emphasis added) (hereinafter "*ABA Guidelines*").[14] With respect to forensic evidence, the ABA directs the following: "With the assistance of appropriate experts, counsel should [] aggressively re-examine all of the

government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." Id. at 1020.

In our opinion, the PCR court correctly found ineffective assistance of counsel. We find respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence. Furthermore, the evidence at the PCR hearing establishes that if they had made an appropriate challenge, it would have had a significant impact on the guilt phase of this case.

First, we note that the testimony from both trial counsel at the PCR hearing indicates how crucial the gunshot residue evidence was to respondent's defense. They had not expected the results to come back negative, and those negative results considerably undermined respondent's account of the incident. While counsel did seek out an expert, counsel nevertheless was deficient for retaining Avery, Powell's former SLED supervisor, as their expert. Although Avery was no longer working for SLED in 1996 when he was retained as a defense expert, the PCR court correctly found that Avery was not **an independent** expert because he had reviewed the gunshot residue report in his role as Powell's supervisor.[15] In order for Avery to question Powell's findings he would have implicitly had to have cast doubt on his own oversight of that very same analysis. Although there is no evidence that Avery did, in fact, render a biased opinion to defense counsel, we agree with the PCR court that it was unreasonable for counsel to choose Avery as their only expert on the critical gunshot residue analysis. See Strickland v. Washington, 466 U.S. at 690 ("counsel's function ... is to make the adversarial testing process work in the particular case"); *ABA Guidelines*, supra (recommending independent investigation as well as an "aggressive re-examin[ation]" of all of the State's forensic evidence).

Furthermore, we note that the State – during both Avery's testimony and its closing argument – emphasized for the jury the

fact that Avery had been hired by the defense and nonetheless had confirmed Powell's conclusions.[16]

Additionally, counsel did not discuss the gunshot residue analysis at all with Powell during their pretrial investigation. Powell testified at PCR that he would have explained to defense counsel why he believed some of the particles were "interesting;" this discussion would have given counsel an opportunity to prepare an effective cross-examination which would have resulted in Powell testifying that the evidence was not inconsistent with Coffey handling the gun. In our opinion, counsel were unreasonable in not exploring the gunshot residue evidence with Powell prior to trial. Troedel v. Wainwright, supra (counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case); see also *ABA Guidelines*, 31 Hofstra L. Rev. at 1019 ("counsel should seek out and interview potential witnesses").

Even at trial, however, Powell's testimony clearly alluded to some uncertainty in the evidence. Powell testified there were "several particles which were **very interesting**, but there was not any **or enough** material for us to be able to call gunshot residue; thus, [Coffey] ha[d] no gunshot residue on her hands." (Emphasis added). Counsel should have cross-examined Powell as to what he meant by "very interesting" and not "enough material." Had counsel asked these questions, Powell would have filled the "hole" in the defense which they thought was created (but actually was not) by Powell's ultimate conclusion of "no gunshot residue." Accordingly, we find that counsel's decision to not cross-examine Powell on the gunshot residue evidence was not an objectively reasonable strategy. See Ingle v. State, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (counsel must articulate an objectively reasonable strategy to avoid a finding of ineffectiveness).

Moreover, the State's heavy reliance in closing argument on the lack of gunshot residue further supports how critical it would have been if counsel had elicited testimony from Powell that the

evidence indeed was consistent with Coffey handling a gun. The Deputy Solicitor argued:

> if there is no gunshot residue on her hands, as Joe Powell told you, then her hand wasn't on that gun when it went off. Her hand wasn't near that gun when it went off.... if they can't discount Joe Powell, if they can't discount those tests, then they can't get past the fact that there is no residue and then everything else they have raised is absolutely irrelevant, everything.... They have got to – got to – discount the value of those tests.

Respondent clearly showed that counsel could have established that while there was a scientific finding of "no gunshot residue," there nevertheless was evidence consistent with (but not conclusive of) Coffey handling the gun. Had counsel elicited this testimony from Powell, the State would not have been able to attack the defense theory as convincingly as it did.

The State's heavy reliance on defense counsel's failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice. We note that the jury apparently did not believe this to be an open-and-shut case of murder because after deliberating for an hour, the jury asked for further clarification from the trial court on the definitions of murder and involuntary manslaughter. It is also worth noting that because the jury did have the option of involuntary manslaughter, it could have accepted respondent's account and yet still found him criminally responsible for the victims' deaths.[17]

Finally, we disagree with the dissent's suggestion that the PCR court found ineffective assistance of counsel based on respondent's introduction at the PCR proceedings of an expert who conclusively found gunshot residue. The PCR court's findings are based almost exclusively **on Powell's testimony** as to what information he would have provided to counsel if only

they had asked – either prior to trial or on cross-examination. Neither this Court, nor the PCR court, has handed respondent a "second chance" because he has, many years after conviction, found a favorable expert. Instead, the PCR court properly focused on the evidence that counsel failed to appropriately examine the State's forensics evidence and failed to obtain the assistance of **an appropriate** expert. Likewise, it is the evidence available at the time of trial which we, too, rely upon to uphold the PCR court's grant of relief.

In sum, we hold counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient, especially given the fact that this was a capital case with an arguable defense to the guilt phase. There is ample probative evidence to support the PCR court's factual findings of deficient performance compelling us to affirm. Webb v. State, supra (if there is any evidence of probative value to support the PCR court's factual findings, the Court will uphold the findings). Moreover, the PCR court correctly found prejudice. In our opinion, without counsel's errors, there is a reasonable probability the jury would have had a reasonable doubt as to whether respondent was guilty of murder. See Strickland v. Washington, 466 U.S. at 695.

Accordingly, the PCR court's rulings that trial counsel was ineffective and respondent is entitled to a new trial are **AFFIRMED.**

MOORE and PLEICONES, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which BURNETT, J., concurs.

Chief Justice Toal: I respectfully dissent. I would reverse the decision of the PCR court. In my opinion, Ard's trial counsel adequately investigated the issue of gunshot residue on the victim's hands and their failure to cross-examine the State's

gunshot residue expert was neither deficient nor prejudicial to Ard.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must show (1) the performance of counsel was deficient and, (2) but for the errors of counsel, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). According to the majority, Ard's two trial counsel were deficient in failing to pursue the State's gunshot residue expert witness vigorously enough with respect to his conclusion that the victim had no gunshot residue on her hands. The majority also finds Ard's counsel failed to adequately perform their own investigation into the gunshot residue results. The facts, in my opinion, are to the contrary.

In preparation for trial, Ard's counsel did, in fact, hire their own gunshot residue expert to review the gunshot residue test results furnished by the State. Counsel did not ultimately produce this expert as a witness at trial because, upon review of the test results, the expert then indicated to trial counsel that he concurred with the State's expert's conclusion. Instead, at trial, the State called the expert originally obtained by Ard to testify that he had agreed with the State's own expert's findings. In my opinion, Ard's trial counsel appropriately countered this testimony with a cross-examination which called into question the accuracy of the gunshot residue test results. Specifically, counsel elicited testimony from the expert suggesting that the process of fingerprinting the victim would have "interfered" with the gunshot residue test results if done prior to trace evidence collection. Simply stated, Ard's trial counsel sufficiently dealt with the adverse evidence. The fact that Ard's counsel could not force their own qualified expert to tailor his opinion to fit their theory of the case, in my view, is an insufficient basis on which to conclude that these counsel were deficient.

The majority bases its conclusion in part on the PCR court's finding that the expert retained by Ard's counsel was not

"independent" because of his prior involvement with the gunshot residue analysis during his employment with SLED. In my opinion, this is rank speculation, not supported by any evidence of bias in the record. Without more, this assumption does not support the majority's conclusion that selection of this expert by counsel was unreasonable.

Moreover, in the face of unfavorable gunshot residue results, counsel for Ard independently investigated the facts and circumstances of the case by performing their own thorough investigation of the crime scene and hiring experts in both engineering and crime scene investigation in order to corroborate Ard's account of the gun's accidental discharge. Counsel also developed their theory on the accuracy of the gunshot residue results by interviewing three witnesses regarding the handling of the victim's body at the scene. In light of these independent investigations, the fact that counsel did not conduct pre-trial questioning of the State's expert on the results of the gunshot residue analysis, in my opinion, does not fall below an objective standard of reasonableness. *See Simpson v. Moore,* 367 S.C. 587, 627 S.E.2d 701 (2006) ("A decision 'not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'")

Additionally, the record shows a thorough factual explanation by the State's expert who testified that there were not enough indicator particles to conclude there was gunshot residue on the victim's hand. Again, in my view the fact that Ard's trial counsel could not force the State's gunshot residue expert to change his opinion is an insufficient basis on which to conclude that these counsel were deficient. Moreover, the fact that eight years later, PCR counsel were finally able to retain an expert who reached a conclusion favorable to Ard's case (i.e. that the victim's hands contained traces of gunshot residue) does not imply that trial counsel were deficient for failing to find such an expert at the time of the trial.[18] To hold otherwise declares open season on

the criminal justice system by giving a "second chance" to any convicted criminal who is patient enough to seek out an "expert" who will one day provide him with the opinion testimony he desires. [19]

Furthermore, even if these trial counsel were deficient, Ard failed to demonstrate that the deficiency prejudiced his case. The State presented twenty witnesses to show that Ard killed the victim with malice. Although the State emphasized the lack of gunshot residue in its closing argument, in my opinion, the State presented other overwhelming evidence from which a jury could find Ard guilty of murder.

Although not addressed by the majority because of their findings on ineffectiveness of trial counsel, Ard also claimed that appellate counsel was ineffective for failing to directly appeal the dismissal of a juror during the sentencing phase. The juror's qualifications came under scrutiny after the second day of the sentencing phase when the juror's wife approached the trial judge complaining that her husband's jury duty was causing hardship for the family because of his inability to work. The juror's wife also commented that her husband's religious beliefs would not permit him to vote for the death penalty. When asked by the trial court during an in camera conference about his ability to be a fair juror, the juror responded that although he believed he could render a fair verdict under normal circumstances, the fact that his wife had raised doubts in the parties' minds as to his ability to be fair made him feel "targeted" regardless of his ultimate decision. When further questioned about his ability to vote for the death penalty, the juror stated, "I don't think I can be fair at this point." Despite multiple reassurances from the court that this matter would remain private and that the juror would not be accountable to anyone for his vote, the juror reiterated his concerns that his decision "would be a threat" to him and concluded that he could no longer cast a fair vote. The trial court released him from the jury.

In my view, Ard did not show that the failure of appellate counsel to directly appeal the dismissal of the juror amounted to ineffective assistance of counsel. In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). Although Ard supported his argument that counsel was deficient with testimony from appellate counsel acknowledging that he erred in not raising the juror's dismissal on appeal, Ard did not satisfy his burden of proof with a showing of how the juror's dismissal prejudiced his case. In my view, there was nothing prejudicial about the dismissal of a juror who stated that he would feel "targeted" as to his decision and ultimately admitted that he did not believe he could cast a fair vote. Therefore, in my opinion, the PCR court incorrectly determined that the failure to directly appeal the trial court's dismissal of a juror amounted to ineffective assistance of counsel.

For the foregoing reasons, I would hold that the actions of neither trial counsel nor appellate counsel resulted in prejudice against Ard. Accordingly, I would reverse the PCR court's finding of ineffective assistance of counsel based on the failure of trial counsel to adequately investigate and challenge the gunshot residue. I would also reverse the PCR court's finding of ineffective assistance of counsel based on the failure of appellate counsel to raise the issue of the trial court's dismissal of a juror on direct appeal.

BURNETT, J., concurs.

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[1] Johns also testified that he told respondent he was going to call the police and asked respondent what he should tell them. According to Johns, respondent replied: "Tell them I did it and they will have to catch me." On cross-examination, however, trial counsel referred to Johns' written statement given to police on the

date of the incident which did not include the phrase "they will have to catch me."

[2] However, when Powell was recalled by the State in reply, respondent's counsel did cross-examine him about how most of the gunshot residue would have been expelled through the end of the barrel of the gun. Trial counsel also questioned Powell regarding the fact that samples from Coffey's hands might not have been taken until after the body was moved to the hospital for the autopsy and that moving the body around might cause removal of the residue.

[3] The gunshot residue analysis was performed by Powell in 1993. Avery left SLED in 1995. Prior to the April 1996 trial, respondent's counsel hired Avery as a consultant to re-examine the analysis which had been done by Powell and reviewed by Avery.

[4] These matters were also testified to on cross-examination by some of the State's witnesses.

[5] The State's firearms expert testified that the gun, a Charter Arms .44 caliber double action revolver, required only three to three and one quarter pounds of pressure on the trigger to cause the gun to fire when the gun was cocked.

[6] One of the State's witnesses on cross-examination corroborated that when she saw respondent during this time in Atlanta, he was upset or sleeping. One of respondent's witnesses, Jerry Logue, testified that while respondent was staying at his apartment these days in Atlanta, he was upset, crying, did not eat, and spent most of the time sleeping.

[7] Throughout the guilt phase, the defense consistently challenged, both on cross-examination of State witnesses and through defense witnesses, the manner in which evidence was collected and the processing of the crime scene.

[8] Ard was the first South Carolina case where feticide was used to support the death penalty. This Court held that the Legislature intended to include a viable fetus as a "person" or "child" as those terms are used in S.C. Code Ann. §§ 16-3-20(C)(a)(9) & (10), the aggravating circumstances of murdering "two or more persons" and "murder of a child eleven years of age or under."

[9] In addition, the PCR court granted respondent a new sentencing trial based on appellate counsel's failure to raise on direct appeal an issue involving the trial court's dismissal of a juror during the sentencing phase. Because we affirm the PCR court's grant of a new trial to determine guilt, we need not address the State's remaining issue related to sentencing. See Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive).

[10] At his deposition, Powell specifically stated the following with regard to Coffey's gunshot residue tests:

> If this person had handled the gun, grabbed it in some way, done [sic] something to knock it away this could be consistent with it. I have seen this happen where people have handled weapons. I've seen chunky [i.e., non-round] particles and I've seen – this is well within the realm of possibility.

During his direct examination at the PCR hearing, Powell stated that under the "current protocol," the results would permit a finding of "may be consistent with gunshot residue."

[11] Powell specifically stated at the PCR hearing that if counsel had questioned him about the "interesting" particles, he would have testified as follows: "'The report is reading as no gunshot residue detected, and that is my position, but there are some things here which if – can they come from a gun? Yes. But they may not be from a gun.'" Likewise, at the deposition, Powell

stated that because there were two (non-round) particles found on Coffey with the required three elements, this "absolutely" indicated – even in 1996, the time of trial – that a weapon was involved. Regarding those two particles, Powell stated "[t]hat is absolutely something which I do not find without usually a weapon."

[12] Although counsel had filed discovery motions in March 1994, Duncan and Fullwood testified they received 1200 pages of documents on February 2, 1996. When trial counsel received this discovery was approximately when they first were informed the trial would be in April 1996. Counsel moved for a continuance in March 1996, but the trial court denied the motion.

[13] When asked if Avery was counsel's first choice for a gunshot residue expert, Fullwood responded, "Well the thing was that there wasn't – We were under such time constraints there was no such thing as trying to make a choice about anything."

[14] In Strickland, the United States Supreme Court explained that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining" whether counsel's performance is reasonable. Strickland v. Washington, 466 U.S. at 688. More recently, the Supreme Court again clearly enunciated that the reasonableness of counsel's conduct may be measured by the ABA's guidelines for capital defense. Wiggins v. Smith, 539 U.S. 510, 524 (2003). Additionally, "[t]he ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984." Hamblin v. Mitchell, 354 F.3d 482, 487 (6th Cir. 2003).

[15] We reject the dissent's suggestion that we are holding it was a lack of time which caused counsel's unreasonable decision regarding the retention of Avery as respondent's gunshot residue expert. Indeed, we agree with the dissent that counsel

"expeditiously" retained an expert. We disagree, however, with the dissent's view that this expert must be presumed to be an appropriate one. Given his previous involvement in the case while employed with SLED, any presumption about his objectivity is untenable.

[16] The Deputy Solicitor specifically argued in closing that the defense could not attack Powell's testimony "because their own expert, Mike Avery, was hired by the defense to review Mr. Powell's work.... He found no fault with Joe Powell's findings...."

[17] The trial court instructed the jury that involuntary manslaughter is the "unlawful killing of another without malice, express or implied, by some act or omission constituting criminal negligence. Criminal negligence is the reckless disregard of the safety of others." The trial court further instructed the jury that if there was a reasonable doubt as to whether respondent was guilty of murder or manslaughter, then the jury must "give him the benefit of the doubt and find him guilty of manslaughter." During the guilt phase, there was much testimony about drug use and drug dealing by respondent and his acquaintances. There was also testimony about how respondent carried a gun and that the gun was on the floor of the trailer before Coffey was shot. Considering this evidence, we find the jury could have believed respondent's account and yet could have also decided that respondent recklessly disregarded the safety of his pregnant girlfriend and unborn son, therefore allowing the jury to return a verdict of involuntary manslaughter.

[18] The record shows that trial counsel received the State's gunshot residue results on February 2, 1996, and the underlying raw data on March 1, 1996. The majority implies that the time between February 2, 1996, and April 15, 1996, when the trial was scheduled to begin, was insufficient for trial counsel to retain a qualified gunshot residue expert. However, those in the legal profession are well aware that trial preparation does not occur in

a perfect world. In my view, we must presume Ard's trial counsel operated appropriately and expeditiously in retaining their expert because there is no evidence that the expert, a former supervisor in SLED's trace evidence department, was biased or otherwise unqualified to perform an accurate evaluation of the State's results on such "short notice."

[19] Additionally, I note that in support of their conclusion that trial counsel were deficient, the majority cites extensively to American Bar Association (ABA) guidelines on the prevailing norms of practice. The majority justifies their reliance on ABA guidelines by pointing to an endorsement of ABA standards in *Strickland v. Washington*. In my opinion, however, the *Strickland* court makes it clear that the ABA standards, although helpful, are "only guides" for assessing reasonableness. 466 U.S. at 688. In fact, the *Strickland* court cautions:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland, 466 U.S. at 688-89. This Court has never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina. Therefore, in my view, "reasonableness" in the instant case is best assessed in the broader context suggested by *Strickland*.

APPENDIX II

LETTER ORDER DENYING PETITION FOR REHEARING-
April 4, 2007

The Supreme Court of South Carolina
Daniel E. Shearouse
Clerk of Court

April 4, 2007

Assistant Attorney General Melody J. Brown
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Ard, Joseph Lee v. Catoe, William

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ James e. Moore J.
s/ John H. Waller, Jr. J.
s/ E. C. Burnett, III J.
s/ Costa M. Pleicones J.

I would grant rehearing.

s/ Jean H. Toal C.J.

April 4, 2007."
The remittitur is today being forwarded to the lower court.

OB

(2)

8-8-07

No. 07-33

IN THE
SUPREME COURT OF THE UNITED STATES

JON OZMINT, Director,
South Carolina Department of Corrections,

Petitioner,

versus

JOSEPH LEE ARD,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

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CAPITAL CASE

QUESTIONS PRESENTED

I. WHETHER THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND v. WASHINGTON* IN CONCLUDING THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT, WHERE COUNSEL, AWARE THAT THE STATE'S FORENSIC GUNSHOT RESIDUE TEST RESULTS WERE CRITICAL TO THE CASE, MADE NO ATTEMPT TO INTERVIEW THE STATE'S EXPERT PRIOR TO TRIAL, DID NOT INDEPENDENTLY INVESTIGATE THE TEST RESULTS, DID NOT CROSS-EXAMINE THE EXPERT AFTER HIS TESTIMONY SUGGESTED IT WOULD BE BENEFICIAL, AND CONSEQUENTLY FAILED TO INFORM THE JURY THAT THE TESTS WERE CONSISTENT WITH MR. ARD'S DEFENSE, NOT DISPOSITIVE DISPROOF OF IT.

II. WHETHER THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND v. WASHINGTON* IN FINDING, WHERE THE PROSECUTION POSITED THE UNCHALLENGED AND UNEXPLAINED GUNSHOT RESIDUE TEST RESULTS AS PIVOTAL, AND OTHER EVIDENCE DID NOT POINT STRONGLY TO MURDER, THAT BUT FOR COUNSEL'S ERRORS IT WAS REASONABLY PROBABLE THAT THE JURY WOULD HAVE CONVICTED MR. ARD OF INVOLUNTARY MANSLAUGHTER, NOT MURDER.

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American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (reprinted in 31 Hofstra L. Rev. 913 (2003)) . . 17, 21

CITATION TO OPINIONS BELOW

The decision of the Supreme Court of South Carolina, *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007), is attached as Appendix I to the Petition for Writ of Certiorari. The Order of the Supreme Court of South Carolina denying the petition for rehearing is attached to the Petition as Appendix II.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on March 5, 2007, and denied the petition for rehearing on April 4, 2007. Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

This case involves the Fourteenth Amendment to the United States Constitution, which applies the Sixth Amendment to the states, and which provides, in relevant part, that "[n]o state may deprive any person of life [or] liberty ... without due process of law."

STATEMENT OF THE CASE[1]

Two state courts have reviewed Mr. Ard's case under *Strickland v. Washington*, 466 U.S. 688 (1984). Both found, in straightforward application of this Court's precedent, that trial counsel's performance was deficient and that it was prejudicial, in

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[1] Respondent cites the Record on Appeal (App.), the Petition for Writ of Certiorari, docketed July 9, 2007 (Pet.), and the slip opinion of the Supreme Court of South Carolina in *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007), which is attached to the Petition for Certiorari as Appendix I (Slip op.).

violation of the Sixth and Fourteenth Amendments to the United States Constitution. The state post-conviction court, following an evidentiary hearing, granted Mr. Ard a new guilt-innocence trial. The Supreme Court of South Carolina, as it must upon finding probative evidence in the record that supports the post-conviction court's ruling, affirmed. *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007).[2]

Mr. Ard's trial involved a closely contested battle over whether he was guilty of involuntary manslaughter or capital murder. Charged in the shooting deaths of his pregnant girlfriend, Madalyn Coffey, and their unborn fetus, Ard never denied his involvement, describing the shooting as a spontaneous series of events that began when Coffey, believing Ard was having an affair, grabbed his gun and threatened to shoot herself, and which ended in a tragic accident as he and Coffey struggled over the hair-trigger gun. The prosecution in this case focused centrally on forensic evidence, and the Commissioner's appeal concerns the critical piece – the results of the State's testing for gunshot residue on samples taken from Ms. Coffey's hands. At trial, the state forensic experts reported that the gunshot residue tests were negative, that the samples contained "no gunshot residue." In closing argument, the state prosecutor (solicitor) argued the "no gunshot residue" finding conclusively disproved Ard's accident account. The jury, after asking the court to re-read the definition of involuntary manslaughter, convicted Ard of capital murder.

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[2] The state post-conviction court also granted sentencing relief on a separate ground. App. 4668, 4673. The Supreme Court of South Carolina, affirming the post-conviction court's determination that Ard was entitled to a new guilt-innocence trial under *Strickland*, did not address the post-conviction court's grant of sentencing relief. 642 S.E.2d at 594 n.9 (Slip op. at 21 n.9) (citing *Whiteside v. Cherokee County Sch. Dist. No. One*, 428 S.E.2d 886 (S.C. 1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive)).

The state supreme court broke no new ground in finding counsel performed deficiently under *Strickland* where counsel, well aware that the state's forensic gunshot residue test results were critical to the state's case, made no attempt to interview the state gunshot residue expert (the key witness) prior to trial, did not independently investigate the test results, did not cross-examine the expert after his direct testimony suggested that cross-examination would be beneficial, and consequently failed to communicate to the jury that – unbeknownst to trial counsel and contrary to the solicitor's closing argument – the state's gunshot residue results (reported in conclusory fashion as "no gunshot residue") were actually consistent with Ard's testimony. Nor did the state supreme court break new ground under *Strickland* in finding, in this case where the other evidence did not point strongly to capital murder and the prosecution posited the gunshot residue test result as the central evidence, that but for counsel's errors it was reasonably probable that the jury would have convicted Mr. Ard of involuntary manslaughter, not murder.

The Commissioner's petition seeks review of a straightforward *Strickland* ruling by the state supreme court. The petition presents no "compelling reasons" that merit this Court's review. Sup. Ct. R. 10 (West 2005).

I. The Supreme Court of South Carolina's Ruling

Under state law in South Carolina, the ruling of a post-conviction court is entitled to great deference. *See Burnett v. State*, 576 S.E.2d 144 (S.C. 2003); *Caprood v. State*, 525 S.E.2d 514 (S.C. 2000). A post-conviction court's ruling must be upheld by the appellate court if there is any probative evidence in the record to support it. *Webb v. State*, 314 S.E.2d 839 (S.C. 1984); *Caprood*, 525 S.E.2d at 517. The appellate court will

only reverse the post-conviction determination when it is controlled by an error of law. *Pierce v. State*, 526 S.E.2d 222, 225 (S.C. 2000).

Applying the state law standard of review and this Court's ineffective assistance of counsel jurisprudence following from *Strickland v. Washington*, *see* 642 S.E.2d at 596-97 (Slip op. at 10-11) (discussing *Strickland* principles)), the Supreme Court of South Carolina ruled that the post-conviction court's determinations of deficient performance and prejudice were "well supported by the evidence presented at the PCR hearing." 642 S.E.2d at 594 (Slip op. at 7); *see id.* at 597 (Slip op. at 12) (finding "respondent proved that trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence" and "the evidence at the PCR hearing establishes that if they had made an appropriate challenge, it would have had a significant impact on the guilt phase of this case"); *id.* at 599 (Slip op. at 15) (finding "ample probative evidence to support the PCR court's factual findings of deficient performance compelling us to affirm . . . without counsel's errors, there is a reasonable probability the jury would have had a reasonable doubt as to whether respondent was guilty of murder") (citing *Strickland*).

A. Finding Deficient Performance

The state supreme court focused on a composite of failures by counsel to investigate, evaluate, and challenge the state's gunshot residue test results – any one of which would have allowed counsel to show that the gunshot residue test results did not negate Ard's testimony. Despite knowing "how crucial the gunshot residue evidence was to [Ard]'s defense," *id.* at 597 (Slip op. at 12), counsel did not discuss the gunshot residue evidence "at all" with State Law Enforcement Division (SLED) Agent Joseph Powell, who reported the negative result. *Id.* at 598 (Slip op. at 13). Agent Powell testified

during the post-conviction proceedings that, if asked before trial or at trial, he would have informed counsel that the results were, in fact, "consistent with gunshot residue and could have come from [Ms. Coffey] handling a weapon." *Id.* at 595 (Slip op. at 8). A pretrial discussion with Powell, the court reasoned, "would have given counsel an opportunity to prepare an effective cross-examination which would have resulted in Powell testifying that the evidence was not inconsistent with Coffey handling the gun." *Id.* at 598 (Slip op. at 13). The court found counsel "were unreasonable in not exploring the gunshot residue evidence with Powell prior to trial." *Id.* (citing *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987)).

"Even at trial," the state supreme court emphasized, "Powell's testimony clearly alluded to some uncertainty in the evidence," when he stated that there were "several particles which were *very interesting*, but there was not any *or enough* material for us to able to call gunshot residue; thus [Coffey] ha[d] no gunshot residue on her hands." *Id.* (emphasis in opinion). If they had asked Powell to explain these statements, the court held, "Powell would have filled the 'hole' in the defense." *Id.* Counsel's decision not to cross-examine the state gunshot residue witnesses because counsel 'didn't want to draw any more attention to it' since they 'had no response to what they had to say,'" *id.* at 595-96 (Slip op. at 9) (quoting trial counsel evidentiary hearing testimony), was "not an objectively reasonable strategy." *Id.* at 598 (Slip op. at 13) (citing *Ingle v. State*, 560 S.E.2d 401, 405 (S.C. 2002) (applying *Strickland*)).

Further, after receiving the state's "no gunshot residue" test result, which counsel knew "considerably undermined [Ard's] account of the incident," they spoke only with former SLED Agent Michael Avery, who while at SLED had supervised Powell's tests of

the gunshot residue for Ard's case. *Id.* at 597-98 (Slip op. at 12). Although Avery was no longer working for the state forensic laboratory, the court recognized that "the PCR court correctly found that Avery was not *an independent* expert because he had reviewed the gunshot residue report in his role as Powell's supervisor." *Id.* at 597 (Slip op. at 12) (emphasis in original). "In order for Avery to question Powell's findings," the court continued, "he would have implicitly had to have cast doubt on his own oversight of that very same analysis." *Id.* Noting there was no evidence that Avery "did, in fact, render a biased opinion," the court agreed with the state post-conviction court that "it was unreasonable for counsel to choose Avery as their only expert on the critical gunshot residue analysis." *Id.* at 597-98 (Slip op. at 12); *see id.* at 597 n.15 (Slip op. at 23 n.15) ("Given [Avery's] previous involvement in the case while employed with SLED, any presumption about his objectivity is untenable."). The court pointed out that the state called Avery as a witness at trial, and the solicitor emphasized to the jury during both Avery's testimony and summation that Avery was hired by the defense and "nonetheless had confirmed Powell's conclusions." *Id.* at 598 (Slip op. at 13).

The state supreme court found the critical nature of the gunshot residue testimony highlighted by the post-conviction testimony of trial counsel. *Id.* at 595 (Slip op. at 8). And the court found that the prosecution's "heavy reliance in closing argument on the lack of gunshot residue further support[ed] how critical it would have been if counsel had elicited testimony from Powell that evidence was consistent with Coffey handling a gun." *Id.* at 598 (Slip op. at 13-14).[3] In conclusion, the court held that Ard "clearly showed that

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[3] The court quoted this portion of the Deputy Solicitor's summation:

> [I]f there is no gunshot residue on her hands, as Joe Powell told you, then her hand wasn't on that gun when it went off. Her hand wasn't near that gun when it went off .... if

counsel could have established that while there was a scientific finding of 'no gunshot residue' there nevertheless was evidence consistent with (but not conclusive of) Coffey handling the gun[:] Had counsel elicited this testimony from Powell, the State would not have been able to attack the defense theory as convincingly as it did." *Id.* (Slip op. at 14).

B. Finding Prejudice

The state supreme court found that the prosecution's "heavy reliance" on the gunshot residue test results also "highlight[ed]" prejudice. *Id.* at 598 (Slip op. at 14). Further, the jury's request for clarification on the definitions of murder and involuntary manslaughter after an hour of deliberation, the court noted, showed this was not an "open-and-shut case of murder." *Id.* The court noted that "because the jury did have the option of involuntary manslaughter, it could have accepted [Ard]'s account and yet still found him criminally responsible for the victims' deaths." *Id.* at 598-99 (Slip op. at 14); *see id.* at 599 n.17 (Slip op. at 23 n.17) (explaining involuntary manslaughter charge that jury received). In addition, there was other evidence that the jury may have found that supported involuntary manslaughter, including "much testimony about drug use" (Ard testified that he had smoked "a joint" and was drinking at the time of the incident) and that "Ard carried a gun and that the gun was on the floor of the trailer before Coffey was shot." "Considering this evidence," the court found, "the jury could have believed [Ard]'s account and yet could have also decided that [Ard] "recklessly disregarded the safety of his pregnant girlfriend and unborn son, therefore allowing the jury to return a

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> they can't discount Joe Powell, if they can't discount those tests, then they can't get past the fact that there is no residue and then everything else they have raised is absolutely irrelevant, everything.... They have got to-got to-discount the value of those tests.
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> 642 S.E. 2d at 598 (Slip op. at 14).

verdict of involuntary manslaughter." *Id.*[4] The court clarified that its determination was based on "the evidence available at the time of trial." *Id.* at 599 (Slip op. at 15).[5]

II. The Relevant Trial Evidence

A. The Shooting

Ard was the only witness to the shooting. The only other person at the trailer where the shooting occurred was Jay Johns, a friend of Ard and Ms. Coffey's. Ard's testimony and Johns' testimony about the events leading up to the shooting and the shooting itself do not conflict. On the evening of April 22, 1993, Ard visited Johns at John's new trailer. App. 2214. Johns was involved in a troubled relationship with Marie

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[4] The state supreme court dissenting opinion disagrees with the PCR court's finding of deficient performance and prejudice. 642 S.E.2d at 599 (Slip op. at 16) (Toal, C.J., dissenting) ("In my opinion, Ard's trial counsel adequately investigated the issue of gunshot residue on the victim's hands and their failure to cross-examine the State's gunshot residue expert was neither deficient nor prejudicial to Ard."). In the dissent's view, Ard's counsel "sufficiently dealt" with the "adverse [gunshot residue] evidence" at trial by challenging the *collection* of the evidence. *See id.* at 599-600 (Slip op. at 16). In the dissent's view, the court engaged in "rank speculation" when it found that Avery was not "independent" simply based on his prior involvement with the testing. His lack of qualification therefore, the dissent argues, is an "assumption" that "does not support the majority's conclusion that selection of this expert by counsel was unreasonable." *Id.* at 600 (Slip op. at 17). The dissent also faults the majority for relying on the ABA norms because the court had never previously "adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina." *Id.* at 600 n.19 (Slip op. at 24 n.19). Finally, the dissent argues there was no prejudice because the state presented twenty witnesses amounting to "other overwhelming evidence" supporting conviction. Id. at 601 (Slip op. at 18) (failing to describe what evidence is overwhelming). The dissent acknowledged, however, that "the State emphasized the lack of gunshot residue in its closing argument." *Id.* at 601 (Slip op. at 18).

[5] The post-conviction court in applying *Strickland* found deficient performance and prejudice on substantially the same grounds as the state supreme court. In addition to the facts pointed to by the state court, the post-conviction court noted that counsel was also deficient in failing to recognize a discrepancy between the stated result of no gunshot residue and a SLED worksheet that noted the presence of two unique particles of gunshot residue. App. 4656; *see* App. 4657 ("In light of defense counsel's theory, the SLED reports should have been thoroughly investigated and vigorously challenged. Despite having such a pivotal role in defense counsel's theory of the case, the discrepancies in the SLED reports were not discovered or exploited."). The post-conviction court also identified more specific ways in which the cross-examination of Powell could have assisted the defense: for instance, counsel never asked Powell about the fact that a preliminary test for gunshot residue provided a strong enough indication that SLED thought it warranted SEMS testing, which is more involved and time consuming. App. 4658, 4663. On prejudice, the post-conviction court similarly found that "[d]efense counsel's failure to refute gunshot residue evidence transformed an arguable case into a clear case. The prosecution's guilt-phase closing in and of itself made the presence or absence of gunshot residue on Ms. Coffey's hands critical to Mr. Ard's defense. . . ." App. 4663-64.

Sprouse Johns, who was friendly with Ard's girlfriend, Madalyn Coffey. App. 1606, 1629. Ard told Johns he had seen Marie and Madalyn the day before at a friend's house and that they were staying at a motel. App. 2214-15 (Ard testimony); *see* App. 1630 (Johns testimony). Johns wanted to talk to Marie and asked Ard to go with him. App. 1606, 2215. Ard agreed. App. 2215. In the motel parking lot, they saw Marie and Madalyn in a car with Johns' daughter. App. 1673, 2216. They went back to the motel room, and as Johns and Marie yelled at each other in the main room, Ard and Coffey spoke in the bathroom, quietly, and she was crying. App. 1632, 2217, 2219. Madalyn, who was pregnant, suspected Ard was having an affair. App. 2218.[6]

After a half hour, Johns wanted to leave, and as Ard and Madalyn kissed goodbye, she asked to come with him. App. 1633, 2219. Ard agreed, and the three went back to the mobile home in Johns' car. App. 1633, 2219. Johns drove, a friend who stopped by the motel before they left rode in the passenger seat on part of the trip, and Ard and Madalyn sat in the back – even after they dropped the friend off, hugging and kissing as Ard tried to "reassure her everything was okay." App. 1634-35, 2220.

At the trailer, Madalyn sat on the couch. Johns went in the kitchen, and Ard sat down on the floor near the couch. App. 2222. His revolver, which he carried a lot, was

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[6] Ard was twenty years old. Ms. Coffey was seventeen. They met in February of 1992 at a shopping mall in Columbia, South Carolina. App. 2204. As Ard recalled, "she was outgoing and carefree and spoke what was on her mind." App. 2204. As Ard described, Madalyn was the first "girlfriend that I really cared about":

> It's hard to describe. I mean, she'd come in the room and it would just brighten the whole room up. We just loved each other. I could talk to her and we just got along real good. We just spent a very lot of time together. She always came over to my house and she would stay there with me and my mother or I would get a motel room and stay at a motel room. We used to talk about all kinds of things.

App. 2204-05, 2206. In August of 1992, Madalyn became pregnant. App. 2206. Ard was happy and excited. App. 2207. Friends could see this. App. 1624, 2128, 2130, 2188. In preparation, he purchased maternity clothes. App. 1624, 2208. They planned to get married after the baby was born. App. 2211. Madalyn's mother kicked Madalyn out of the house after she became pregnant, and Madalyn and Ard stayed by turns at Ard's mother's house, at motels, and in a trailer with friends. App. 2236, 2239, 2244.

next to him on the floor near the sofa where Madalyn was sitting. App. 2222, 2254.[7] Johns rolled a joint in the kitchen, which he and Ard smoked. App. 1612, 2224. Afterward, Johns went outside. App. 1613. Ard turned the stereo on and sat down on his knees, drinking a beer, on the floor next to Madalyn. App. 2224. Madalyn asked him what he was going to do. App. 2225. Ard said he was going back to Atlanta. App. 2225. Madalyn asked if she could go with him, Ard said no, and Madalyn got upset. App. 2225. She told him she thought he was going to Atlanta to pursue an affair with another girl. App. 2227, 2256. She said she didn't love him and that he didn't love her and the baby. App. 2227. "We might as well be dead," she said. App. 2227. And she picked up his gun from the floor and pulled back the hammer. App. 2227. Ard told her she was acting crazy. App. 2227. He said "give me the goddamn gun, Madalyn." He reached up to grab the gun from Madalyn, his hand falling around the cylinder gap, Madalyn turned, and the gun went off.[8] App. 2227-28, 2260. Madalyn fell over, the gun fell to the floor. App. 2228, 2267. The gunshot wound to Madalyn's head was fatal. Moments later, Madalyn's and Ard's unborn fetus died from lack of oxygen. App. 2015.

Johns testified that when he heard a popping sound, he returned to the trailer, exchanged words with Ard, and Ard looked freaked out. App. 1614-17, 1635-36. Ard said to Johns, "Oh, God, I think Madalyn is dead," and told him to call 911. App. 2228, 2263; *see* App. 1615-1616. Then he ran. App. 2228, 1618.

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[7] Defense counsel introduced testimony that Ard frequently carried a gun. *See* App. 2223. Counsel also attempted at one point to introduce testimony that Ms. Coffey frequently picked up Ard's gun. App. 2115-16, 2139. In response to the State's objection, the trial court suggested that counsel recall the witness at a later time once the relevance of the testimony had been established, App. 2117, 2140, but trial counsel never did. The PCR court found that counsel's failure to recall the witness was deficient performance under *Strickland*, but not prejudicial. App. 4659.

[8] The gun is a Charter Arms Bulldog Pug, a .44 caliber revolver. App. 1961, 1964. The trigger weight with the hammer pulled back is 3 to 3 1/4 pounds—what ballistics experts and others refer to as a "hair trigger," requiring a very light touch to fire. App. 1962, 1966.

Ard got in his car and drove to Atlanta. App. 2230. Three tear-filled and sleepless days later, App. 2181 (witness testimony, describing Ard in Atlanta), Ard returned to turn himself in, and his mother, father, and two brothers picked him up at the bus station in Augusta. App. 2230. They then took him to the office of an attorney in Columbia, who had made arrangements for Ard to present himself to the Lexington County Sheriff's Department. App. 2232. Ard passed out in the attorney's office and woke up in the intensive care unit of Lexington County Hospital. App. 2233; *see* App. 2277-85 (*in camera* testimony of Jack Swerling, Esq.). Upon release from the hospital, Ard turned himself in to the Lexington County Sheriff's Department. App. 2233.

B. The Gunshot Residue Testing

The State called three South Carolina Law Enforcement Division (SLED) Agents to testify about the gunshot residue tests. Two types of gunshot residue samples were taken from Ms. Coffey's hands: particle lift samples for use with a scanning electron microscope (SEMS) and nitric acid swabs for use with atomic absorption (AA) testing. Agent Powell testified that because the AA samples, used as a "screening" test, gave the trace lab scientists "an indication" that there was gunshot residue, the scientists proceeded to test the SEMS samples. App. 1939. In performing the tests, Powell testified that he found "several particles which were very interesting, [but] there was not enough of any or enough material for us to able to call gunshot residue; thus, she has 'no gunshot residue' on her hands." App. 1940. The State also called former SLED Agent Michael Avery, the Trace Evidence Department Supervisor who had supervised Powell's work. App. 1919. Avery testified that he still confirmed "the conclusion of the test results, which was no gunshot residue." App. 1921. The State also called SLED Agent

John Barron, who collected the data from the scanning-electron microscope and gave it to Agent Powell for analysis. App. 1927. Counsel did not cross-examination any of the SLED witnesses concerning the gunshot residue test conclusions.[9] The gunshot residue test evidence was the only evidence the state presented, alleging facts that countered Mr. Ard's account, that trial counsel did not dispute.[10]

C. The Deputy Solicitor's Summation

When the deputy solicitor delivered the State's summation, he posited Powell's gunshot residue findings as the critical element to the State's case:

> Why are these [the GSR samples] so important? BECAUSE IF THERE IS NOT GUNSHOT RESIDUE ON HER HANDS, AS JOE POWELL TOLD YOU, THEN HER HAND WASN'T ON THAT GUN WHEN IT WENT OFF. HER HAND WASN'T NEAR THAT GUN WHEN IT WENT OFF. HER HANDS WERE SOMEWHERE ASIDE FROM ON THE GUN. THAT'S WHY THEY ARE SO IMPORTANT. They can't attack Joe Powell. . . . [I]f the findings from these [GSR samples] are correct, then the only thing they can do is attack the way it's collected. . . . [I]f they

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[9] After Ard testified, the State recalled Agent Powell to testify that a gun leaves residue on the hand of one who fires it, and may in certain situations also leave tattooing, stippling, and other injuries. App. 2403-05. Defense counsel then asked Powell about how a breeze can blow gunshot residue particles off someone's hands. But counsel did not ask Powell about his determination that the victim's hands had "no gunshot residue." App. 2406-07. Similarly, counsel asked Avery only about how fingerprinting would interfere with the quality of gunshot residue samples taken from a subject's hands. App. 1921-24. This line of questioning – focused on the validity of the *collection* of the SEMS and AA samples – was consistent with defense counsel's focus throughout trial on the collection of evidence at the scene. Defense counsel never challenged the legitimacy of the SLED gunshot residue test conclusions.

[10] At trial, the State called witnesses to testify about threats Ard allegedly made toward Ms. Coffey, *see* App. 1652 (testimony of Marie Sprouse Johns); App. 1721 (testimony of Lisa Madden); App. 1736 (testimony of Steven Bishop), which defense counsel countered witnesses who either refuted the testimony of the State witnesses (Guy King testified he was present on the occasion during which Marie Sprouse testified that she witnessed a threat; King said that he heard no threat and that Sprouse was not actually present, App. 2121-23) or testified that they had never heard Ard threaten Ms. Coffey (Tara Edwards, App. 2137; Brett Turner, App. 2128; Jerry Logue, App. 2162; and Robert Baggett, App. 2130). The State also called witnesses who testified about the investigation of the crime scene. *See* App. 1532 (testimony of Ira Spann); App. 1820 (testimony of Joe Brown); App. 1825 (testimony of Judy Fallaw); App. 1882 (testimony of Billy Allen). This included testimony about the collection of gunshot residue samples. *See* App. 1777 (testimony of Charles Catoe); App. 2407 (testimony of Jake Knotts). Defense counsel countered that testimony with cross-examination of Agent Catoe, and by calling its own crime scene expert (*see* App. 2323) and a mechanical engineer (*see* App. 2300), who described how the trajectory of the bullet that killed Ms. Coffey supported Ard's testimony. Other testimony by State witnesses concerned the medical explanation of Ms. Coffey's and the fetus' death (*see* App. 2008) and Mr. Ard voluntarily turning himself in to Lexington County (*see* App. 1767), but did not pertain to the shooting incident itself.

> can't discount Joe Powell, IF THEY CAN'T DISCOUNT THOSE TESTS, THEN THEY CAN'T GET PAST THE FACT THAT THERE IS NO RESIDUE AND THEN EVERYTHING ELSE THEY HAVE RAISED IS ABSOLUTELY IRRELEVANT, EVERYTHING. The fact that Madalyn handles guns, it's irrelevant. There is no gunshot residue. The fact that the clothes aren't collected, it's irrelevant if there is no gunshot residue. The fact that the couch cushions are not collected, it's irrelevant if there is no gunshot residue. The blinds, the angle of the shot, whatever this thing here is, it's irrelevant, irrelevant if there is no gunshot residue. THEY HAVE GOT TO – GOT TO – DISCOUNT THE VALUE OF THOSE TESTS . . . NO GUNSHOT RESIDUE. NONE. What does that tell y'all? What does that tell y'all?
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> App. 2471-75 (emphasis added).

Defense counsel raised no objection. The Solicitor's point was clear: the no gunshot residue finding conclusively disproved Ard's defense.

III. The Relevant Evidence from the Post-Conviction Proceedings

The post-conviction court heard testimony from four witnesses on matters concerning the gunshot residue testing: SLED Agent Joseph Powell; Robert White, a gunshot residue expert formerly of the West Virginia State Crime Lab; trial counsel John Earl "Jack" Duncan; and trial counsel Elizabeth Fullwood. The state supreme court's determination, like that of the post-conviction court, relied "almost exclusively" on Powell's testimony and that of trial counsel. *See* 642 S.E.2d at 599 (Slip op. at 15).[11]

A. Powell's Testimony

Powell testified in deposition that particles from the Coffey samples could have come from Ms. Coffey handling the gun – that it was "well within the realm of possibility." App. 3572. He confirmed this at the evidentiary hearing. Noting that

[11] White, who had reviewed the SLED gunshot residue report, the data sheets and photographs from the SLED scanning electron microscope, the SLED worksheets, and the deposition testimony of Powell prior to the post-conviction hearing, concluded that the SLED tests established the presence of gunshot residue. App. 3638-3639, 3641-3642, 3646. White also retested the SEMS samples, and reaffirmed that conclusion. App. 3638. Powell and White agreed that the SLED tests showed particles that were consistent with Ms. Coffey handling the gun. The post-conviction court focused on the points of the experts' agreement. *See* App. 4653-58, 4662-63.

gunshot residue may deposit in a number of ways, Powell stated that one way was handling a gun, App. 3793, and that the Coffey samples were consistent with that possibility. App. 3812 ("Is it [the test result] consistent with handling a weapon? Yes."). When Ard's post-conviction counsel asked Powell during the evidentiary hearing why he did not tell the jury what he meant when he said he found "interesting" particles, Powell responded that "unless the questions are being asked of me, I don't know that I can just interject that." App. 3807; *see* App. 3806. Powell said that if asked by defense counsel he would have explained that the "interesting particles" found on Ms. Coffey's hands were characteristic of gunshot residue and "could have come from handling a weapon." App. 3810; *accord* App. 3651-53, 3685 (testimony of White).[12] Powell also said he could *"rule out"* the possibility that Coffey's hand was in front of the barrel of the gun when it fired. App. 3812 (emphasis added).

B. Trial Counsel's Testimony

Trial counsel believed Mr. Ard's case provided significant reason to doubt guilt of intentional murder – significant reason to believe that as Ard described Ms. Coffey's death was an accident. Trial counsel recalled, "We thought we had a very good chance of prevailing – when I say prevailing, I mean getting something less than murder accompanied by aggravating circumstances in the guilt-innocence phase." App. 3736; *see* App. 3991 ("This was a defensible murder case."). Given what counsel perceived to be the integrity of Mr. Ard's account – Ard's account of the events was consistent from

[12] Agent Powell also stated that he was "incorrect" to say there was "no gunshot residue" in the samples taken from Ms. Coffey. App. 3577; *see* App. 3569-3570, 3572. Under current SLED protocol, Powell stated in deposition, the gunshot residue test results were "inconclusive." App. 3572. During the evidentiary hearing, Powell acknowledged a significant difference between a result reporting "inconclusive" and a result reporting "no gunshot residue": "inclusive" means "I'm not sure"; "[n]egative means it is not there." App. 3832-33.

the moment trial counsel met him in February of 1994 (*see* App. 3708, 3980) – counsel pursued an accident defense from early on. Ard's account was corroborated by much of what counsel found at the crime scene. *See* App. 3709-11. Defense counsel hired an expert to assess trajectory to prove that the angle of the gun was as Ard said; they hired a crime scene expert to assess the State's collection of evidence. App. 3710-11.

But SLED's reported finding of no gunshot residue on Ms. Coffey's hands (App. 3734, 3962; *see* Powell Deposition Exh. 6) created a "huge hole" in the defense. The report cut to what trial counsel Duncan identified as the "core issue" of the case: If Ms. Coffey picked up the gun, why didn't she have gunshot residue on her hands? App. 3712-3713. Counsel testified to the report's significance at the PCR hearing: "[T]he fact that there was not gunshot residue on the victim's hands just kind of blew the whole case out of the water and it made Jody out to be a liar, made our other experts out to be mistaken or for some reason less credible . . . It was a huge hole in the case." App. 3763-3764; *see* App. 3991.

When asked about attempts to hire a gunshot residue expert, counsel responded that they contacted Michael Avery, who supervised the gunshot residue testing of the samples in Ard's case at SLED. According to Duncan, in contacting Avery counsel "were trying to find out if we needed to hire anyone else [and] if there was anything there that we needed to investigate." App. 3750; *see id.* (testifying Avery was contacted "to let us determine whether or not we needed to hire anyone"); App. 3965 (counsel Fullwood recalling that they retained Avery "[t]o see if he could help us understand and explain the results of the gunshot residue tests SLED had conducted"). After Avery informed counsel that "there was nothing there for us to – that was useful to us," that he was

"satisfied with the results of this test," counsel left challenging the gunshot residue testing behind and explored other ways of explaining how Ms. Coffey could have handled the gun and yet have no gunshot residue on her hands, such as evidence collection. App. 3713-15, 3966.

Counsel Duncan explained that they chose not to cross-examine Powell to avoid bringing more attention to the gunshot residue test results. App. 3721. Nor did they speak with Powell before trial. After reviewing Powell's deposition statements asserting that the gunshot residue evidence was consistent with Coffey handling the gun, counsel lamented the failure to question Powell: "We didn't ask the questions and the answers would have helped us immensely. . . . If we had known enough or had done enough research to ask questions, we were just – we didn't ask the questions." App. 3724; App. 3746 ("[W]e had no reason to object [to the gunshot residue testimony] because we didn't know.").

REASONS THE PETITION SHOULD BE DENIED

The Commissioner argues three grounds for certiorari in this case. Each is unfounded. The state court decision is a straightforward application of *Strickland*. Moreover, throughout, the Commissioner fails to acknowledge that under state law, the appellate court must affirm the post-conviction court's ruling upon finding any probative evidence in the record to support it. *See Ard*, 642 S.E.2d at 596 (Slip op. at 10) (citing *Webb*, 314 S.E.2d at 839; *Pierce*, 526 S.E.2d at 225). The state supreme court correctly found, under *Strickland*, that there was probative evidence in the record to support the post-conviction court's grant of relief under the Sixth and Fourteenth Amendments.

I. THE SUPREME COURT OF SOUTH CAROLINA PROPERLY APPLIED *STRICKLAND* IN CONCLUDING THAT PROBATIVE EVIDENCE SUPPORTS THE POST-CONVICTION COURT'S DETERMINATION THAT TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. The Supreme Court of South Carolina Properly Applied *Strickland* in Finding Deficient Performance

To establish ineffective assistance of counsel, a defendant must first demonstrate that his attorney's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. Objective review of counsel's performance must measure "reasonableness under prevailing professional norms" and must take into account "counsel's perspective at the time." *Id.* at 688, 689. In assessing the reasonableness of counsel's performance:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and *strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.* In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91 (emphasis added).[13] The state court did not misapply *Strickland*'s deficient performance prong. *See id.* at 690. The state court's finding of deficient performance is well based in the record.

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[13] One source of prevailing professional norms for counsel in capital cases is the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003). *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). According to the Guidelines, defense has a duty to conduct an "independent investigation," and "with the assistance of appropriate experts" to "aggressively re-examine" the State's forensic evidence in full. Guideline 10.7 (reprinted in 31 Hofstra L. Rev. 913, 1020 (2003)).

Powell testified at deposition and during the evidentiary hearing that the gunshot residue tests, although in his view not positive for gunshot residue, showed particles characteristic of gunshot residue that were consistent with Mr. Ard's account that Ms. Coffey handled his gun. Powell stated further that if defense counsel had asked him whether the evidence was consistent with the victim handling the gun, he would have said yes. Counsel's failure to ask Powell these questions, either before or at trial, and their motivation at trial to avoid the issue altogether during cross-examination because they thought it would place more importance than there already was on the issue, resulted from their incomplete investigation of the gunshot residue analysis. *See* App. 3724.[14]

Reasonable professional judgment does not support the limitations counsel placed on its investigation. *See Strickland*, 466 U.S. at 690-91. The state supreme court cited one case finding capital defense counsel deficient under *Strickland* in very similar circumstances. *See* 642 S.E.2d at 597-98 (Slip op. at 11, 13) (citing *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D. Fla. 1986)).[15] *Troedel* supports the state court's determination. There, as here, the gunshot residue testing was "a most crucial aspect of the trial." *Id.* at 1461. There, as here, defense counsel testified "that he knew pretrial the issue would be critical." *Id.* There, as here, counsel failed to consult with or depose the

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[14] Counsel admittedly did not know enough to ask questions of Powell – as Duncan said, "[W]e didn't ask the questions and the answers would have helped us immensely. . . . If we had known enough or done enough research to ask questions, we were just, we didn't ask questions." App. 3724.

[15] Petitioner argues *Troedel* is distinguishable as a case "based on a showing that testimony regarding the gunshot residue was either false or misleading," and that the state court's citation of the case "highlights the misapplication of federal law." Pet. at 18 n.6. Petitioner's characterization of *Troedel* is misleading. The district court in *Troedel* granted relief on three grounds: a *Brady* violation, the prosecutor's use of misleading evidence, *and* ineffective assistance of trial counsel under *Strickland*, finding counsel performed deficiently in failing "to investigate and consult with experts concerning the testimony about the gunpowder residue analysis." Troedel, 667 F.Supp. at 1460-61.

State's expert witness prior to trial. *Id.* And there, as here, "defense counsel himself had no special knowledge in th[e] field [of gunshot residue]." *Id.*

The only notable distinction between this case and *Troedel* is that in *Troedel* counsel did not consult with an expert, whereas here counsel talked curtly to Avery. But it was not reasonable to rely solely, as counsel did, on Mr. Avery's self-assessment as to his own work.[16] Counsel knew Avery supervised the gunshot residue tests taken from Ms. Coffey. App. 3713. At best, consulting Avery was only a reasonable first step to further investigation. In fact, that is how trial counsel Duncan viewed the contact – "to let us determine whether or not we needed to hire anyone." App. 3750. Stopping investigation of the state's gunshot residue testing after Avery told them that there was "nothing there for us – that was useful to us" – relying entirely on the test supervisor's self-assessment of his work – was not a reasonable basis upon which to forsake further investigation.[17]

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[16] Similarly, it would not be reasonable, in investigating an ineffective assistance of counsel claim, to rely solely on prior counsel's self-assessment as to their own ineffectiveness. *Cf. Massaro v. U.S.*, 538 U.S. 500 (2003). In rejecting a rule under which a claim of ineffective assistance of counsel was defaulted if not raised on direct appeal, this Court explained that the rule, which conflicted with the rules of all but one other Federal Court of Appeals, was inefficient and awkward, in part, because "[o]n direct appeal it puts counsel into an awkward position vis-á-vis trial counsel. . . . trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence." *Id.* at 506.

[17] The Commissioner argues that "[t]he state court simply could not, under federal precedent, presume prejudice in connection with the allegation of ordinary counsel error, yet this court did." Pet. at 17, *see* Pet. at 19-20. The Commissioner cites to *United States v. Cronic*, 466 U.S. 648 (1984). It has never been argued in these proceedings that trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" to the extent that it made "the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659; *cf. Nance v. Ozmint*, 626 S.E.2d 878 (S.C. 2006) (finding complete breakdown of defense throughout guilt and sentencing phases of trial). And no state court ever considered the issue. What the Commissioner means to argue, it seems, is that consulting solely with Avery was a reasonable decision, and that the state court, in finding otherwise, was speculating as to (or "presuming") Avery's bias. But in the limited circumstances of this case, for the reasons discussed above, relying on Avery's self-assessment was unreasonable.

Counsel's pursuit of an "alternate way" of presenting the defense, Pet. at 40 – namely, challenging the validity of the *collection* of the gunshot residue – does not excuse their failure to fully investigate the gunshot residue testing. *See Rompilla*, 545 U.S. at 381-83, 388-89. Counsel's awareness that the gunshot residue testing was critical to the case made their responsibility to pursue investigation and to challenge Agent Powell's testimony "particularly pressing." *Id.* at 386.[18] Counsel's efforts to call an engineer to explain that the trajectory evidence supported Ard's testimony, to call a crime scene expert to challenge the collection of evidence, and to call a number of Ard's friends to testify that Mr. Ard's relationship with Ms. Coffey was not violent, do not absolve the failure to fully investigate the critical gunshot residue test results that they knew were central to the State's case. *See id.* at 381-83, 388-89; *Von Dohlen*, 602 S.E.2d at 743. In fact, counsel's efforts to find other ways to challenge what they believed was a complete lack of gunshot residue on Ms. Coffey's hands underscore the unreasonableness of their abandonment of any challenge to the testing itself. The time counsel spent trying to denigrate the credibility of the evidence collection and shows they viewed the forensic evidence as central. Failing to spend more time investigating the SLED testing was not a matter of trial tactics; it was misplaced reliance on Avery's self-assessment, not reasoned strategic judgment.

The Commissioner also argues that the South Carolina Supreme Court elevated the ABA Guidelines above the law – in effect, that the court found *per se* deficient

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[18] In *Rompilla*, this Court found trial counsel provided ineffective assistance to a capital defendant, where, aware that the prosecution would seek the death penalty based on a prior conviction, they failed to examine the court file on the prior conviction; yet counsel had interviewed family members and had presented reports of three mental health experts. 545 U.S. at 388-89; *see Von Dohlen v. State*, 602 S.E.2d 738, 743 (S.C. 2004) (finding that despite "some effort" and investigation by counsel that "absence of crucial medical records and related information which existed at the time . . . prevented [testifying expert] from conveying an accurate diagnosis and explanation . . . to the sentencing jury").

performance for failure to "conduct thorough and independent investigations relating to the issues of both guilt and penalty" and "with the assistance of appropriate experts" to "aggressively re-examine" the State's forensic evidence (*see* Guideline 10.7, reprinted in 31 Hofstra L. Rev. at 1020). Pet. at 20. The state court did no such thing. The state court's opinion explains that this Court's precedent points to the Guidelines as "guides" (quoting *Strickland*, 466 U.S. at 688), which courts "may" use to "measure[]" the "reasonableness of counsel's conduct" (citing *Wiggins*, 539 U.S. at 524). 642 S.E.2d at 597 (Slip op. at 22 n.14). And that is how the court used them. Tellingly, the state court dissenting opinion does not argue the majority's application of the Guidelines violates this Court's precedent. *Id.* at 600 n.19 (Slip op. at n.19) (Toal, C.J., dissenting). Rather, the dissent simply objects that the ABA Guidelines had not to date been accepted in South Carolina. *Id.*

An attorney's strategic judgments can hardly be questioned – so long as they are based upon reasonable investigation. The Supreme Court of South Carolina did not make any new rules about what trial counsel must do. It found that a composite of failures by counsel amounted to deficient performance.[19] This reasoning is soundly rooted in *Strickland* and *Wiggins* and *Rompilla*. Question I of the Petition does not present an issue meriting the Court's review.

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[19] The state supreme court did not find that asking only one expert, or such an expert as Avery, was *per se* unreasonable; nor did the state court find that it was unreasonable *per se* for counsel not to question the state's expert, here Powell, about the tests prior to trial, as petitioner suggests, *see* Pet. at 20. The state supreme court's finding of deficient performance is plainly based on the totality of counsel's deficient performance, *see* 642 S.E.2d at 597-98 (Slip op. at 12-14), as *Strickland* requires. 466 U.S. at 688.

B. The Supreme Court of South Carolina Properly Applied *Strickland* in Finding Prejudice

To show prejudice under *Strickland*, a party must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 446 U.S. at 694; *see Wiggins*, 539 U.S. at 534. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Strickland*, 446 U.S. at 694; *see Smith v. Mullin*, 379 F.3d 919, 929 (10th Cir. 2004) (a "reasonable probability" is "less than a preponderance of the evidence"). In assessing prejudice, defense counsel's cumulative performance is considered with the totality of the evidence. *Strickland*, 446 U.S. at 695.

The state supreme court set forth the *Strickland* definition of prejudice, 642 S.E.2d at 596 (Slip op. at 11), and addressed the impact of the totality of counsel's deficient performance errors in the context of the trial. *Id.* at 598-99 (Slip op. 14-15). The court recognized that this case involved an arguable defense at the guilt phase. It noted that trial counsel recognized how critical the gunshot residue test results were before trial, and counsel testified that knowing then what is known now regarding the consistency between Powell's findings and Ard's account would have made big difference. *Id.* at 595 (Slip op. at 8); *see* App. 3736, 3763, 3991; App. 3712-3713. The court also recognized that the Deputy Solicitor's summation posited the negative gunshot residue as central to the jury's decision on whether to convict. *Id.* at 598 (Slip op. at 14). Further, the jury note asking the trial court to reread the definition of involuntary manslaughter was indicative of the fact that the evidence against Mr. Ard on the murder charge was not overwhelming, and that a conviction on the lesser charge of involuntary manslaughter was a real possibility. *Id.* at 598-99 (Slip op. at 14). The court also pointed

to other evidence in the record, such as that regarding drug use contemporaneous to the incident and Ard's testimony that he had placed the gun on the floor, that might have led the jury to convict on involuntary manslaughter. *Id.* at 599 (Slip op. at 14); *id.* at 599 n.17 (Slip op. at 23 n.17).

The Commissioner faults the state court for focusing "myopically" on the deputy solicitor's summation. *See* Pet. at 23. The court did not focus on it "myopically," but it did focus on it, and appropriately so. *See Banks v. Dretke*, 540 U.S. 668, 700-01 (2005). In *Banks v. Dretke*, this Court found prejudice "marked" where the "prosecutor's . . . summation . . . left no doubt about the importance the State attached to [a witness's false] testimony," where because of the prosecutor's summation "the [witness's] testimony was the centerpiece of [the] prosecution's . . . case." *Id.* at 700, 701 (prosecutor urging witness's testimony was "of the utmost significance").[20] *See also Arizona v. Fulminante*, 499 U.S. 279, 297 (1991) (prosecution's emphasis on confession as foundation and "centerpiece" of trial "compelled" finding of not harmless error); *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992) (finding prosecutor's closing argument "demonstrates the narrow scope of the state's case" and *Strickland* prejudice). Here, the deputy solicitor's summation posited Powell's testimony as critical:

> Why are these [the GSR samples] so important? BECAUSE IF THERE IS NOT GUNSHOT RESIDUE ON HER HANDS, AS JOE POWELL TOLD YOU, THEN HER HAND WASN'T ON THAT GUN WHEN IT WENT OFF. HER HAND WASN'T NEAR THAT GUN WHEN IT WENT OFF. HER HANDS WERE SOMEWHERE ASIDE FROM ON THE GUN. THAT'S WHY THEY ARE SO IMPORTANT. They can't attack Joe Powell. . . . [I]f the findings from these [GSR samples] are correct, then the only thing they can do is attack the way it's collected. . . . [I]f they can't discount Joe Powell, IF THEY CAN'T DISCOUNT THOSE TESTS, THEN

[20] In *Banks*, this Court reviewed and found prejudice on a *Brady* claim. The *Brady* materiality standard, enunciated in *United States v. Bagley*, 473 U.S. 667 (1985), and the *Strickland* prejudice standard are the same. *See Bagley*, 473 U.S. at 682-83.

> THEY CAN'T GET PAST THE FACT THAT THERE IS NO RESIDUE AND THEN EVERYTHING ELSE THEY HAVE RAISED IS ABSOLUTELY IRRELEVANT, EVERYTHING. The fact that Madalyn handles guns, it's irrelevant. There is no gunshot residue. The fact that the clothes aren't collected, it's irrelevant if there is no gunshot residue. The fact that the couch cushions are not collected, it's irrelevant if there is no gunshot residue. The blinds, the angle of the shot, whatever this thing here is, it's irrelevant, irrelevant if there is no gunshot residue. THEY HAVE GOT TO – GOT TO – DISCOUNT THE VALUE OF THOSE TESTS . . . NO GUNSHOT RESIDUE. NONE. What does that tell y'all? What does that tell y'all?

App. 2471-75 (emphasis added). Defense counsel's failure to cross-examine Powell or present testimony to explain the gunshot residue test results was critical because the summation left the jury with the mistaken view that the gunshot residue evidence destroyed Mr. Ard's case, when in fact it was consistent with it.

Both trial counsel recalled that this was a close case, an arguable, defensible case that turned on the forensic evidence. *See* App. 3736, 3763, 3991. The "core issue," counsel testified, was the gunshot residue findings. App. 3712-13. Yet that was the evidence that the defense failed to counter. *See supra* n.10. When the State presented the critical testimony concerning the gunshot residue test – Powell's testimony that there was absolutely no gunshot residue in the samples taken from Ms. Coffey's hands – the defense did not respond. None of counsel's actions diminished the devastating impact of Powell's unchallenged testimony at trial. *See Rompilla*, 545 U.S. at 387.

The state court properly assessed *Strickland* prejudice in the context of the totality of the trial proceedings, and correctly found that probative evidence supported the post-conviction court's determination. Question II of the Petition does not present an issue meriting the Court's review.

II. THE PETITION MISCHARACTERIZES THE RECORD.

Even if all the Commissioner's Petition says were accurate, there would, for the reasons stated above, be no question asserted that merits this Court's review. Some of the Commissioner's assertions that the state supreme court misapplied *Strickland*, however, stem from inaccurate or misleading characterizations of the record, which distort the Commissioner's argument. This is entirely so with respect to Question III, which argues that the court "misapplied" *Strickland* "when it considered an after trial change in reporting standards and a subsequently retained expert opinion . . . ." *See* Pet. at 25. Each of the Commissioner's misreadings warrants a brief explanation.

* The Commissioner claims, by turns, that the state court overlooked (Pet. at 11; *see* Pet. at 12) or erred in "consider[ing]" (Pet. at i, 25), a post-trial change in state protocol as the basis for Powell's testimony that he would now report the gunshot residue result as "inconclusive." The state court did not overlook this, but rather found that the protocol change was not germane. The court focused on Powell's recognition that the test results were *always* consistent with Ms. Coffey handling the gun and the fact that, "if counsel had asked, either prior to trial of at trial, Powell would have explained." 642 S.E.2d at 595 (Slip op. at 8).

* The Commissioner argues, similarly, that counsel was not deficient in failing to cross-examine Powell because "[n]o matter how clever the question, the state expert would not, indeed could not, have said the test was positive for gunshot residue." Pet. at 15. But the significance of the gunshot residue to the defense did not depend on a "positive" result: As the state supreme court found, 642 S.E.2d at 598-99 (Slip op. at 14), the jury could have found that Coffey's hand was on the gun when it fired, consistent with test results and Ard's account, despite the negative reported result. No state court, including the dissenting Justices in the South Carolina Supreme Court, has taken issue with the fact that Coffey handling the gun was consistent with Ard's defense.[21]

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[21] In footnote 4, the Commissioner indicates that there was testimony at trial suggesting that the low levels of gunshot residue may have supported an argument that Ms. Coffey was "shot at." Pet. at 15 n.4. That is inaccurate, in two respects. First, the trial testimony of Powell (and that of White) confirmed that the quantity of gunshot residue particles is not an issue in determining the presence or absence of gunshot residue. App. 3803. "[N]ormally," Agent Powell stated, "you will have a small number [of particles]." App. 3803. Second, Powell testified that one would only expect lots of gunshot residue particles on the victim's hands if they were in front of the barrel when the gun fired. But Powell testified that in this case he could "rule out" the possibility that Ms. Coffey's hand was in front of the barrel of the gun. App. 3812. Further, that is not what Ard said transpired; Ard testified that Ms. Coffey had the gun in her hand. *See*

- Finally, the Commissioner asserts that the state supreme court erred in "consider[ing] . . . subsequently retained expert opinion." Pet. at 25. The state court expressly said that its determination was based on "the evidence available at the time of trial" and the testimony of the state's own expert, Powell, not the defense post-conviction expert. 642 S.E.2d at 599 (Slip op. at 15). This distinguishes the case from those the Commissioner cites for the proposition that "counsel is 'not required to shop for a more favorable expert,'" Pet. at 19 (quotation omitted).[22]

Question III of the Petition, which is based entirely upon these mischaracterizations, presents no question for the Court's review.

CONCLUSION

The Supreme Court of South Carolina's decision in this case involves a straightforward application of *Strickland v. Washington*. It does not conflict with the decision of another state court of last resort of a federal court of appeals. The Petition asserts no more than what it erroneously deems to be misapplication of a properly stated rule of law. For these reasons, and those set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

By:

App. 2227-28. The Commissioner's assertion contradicts Powell's testimony and that of White, who both testified that the state's test results were consistent with the victim handling the gun as it was fired.

[22] The Commissioner also argues periodically that "establishing that the victim could have handled the weapon does not support Ard's testimony that clearly placed the gun in the victim's hand when it was fired . . . ." Pet. at 22; *see* Pet. at 14. This argument seems to defeat itself: surely establishing that "the victim *could have handled* the weapon" does support Ard's testimony that "placed the gun *in the victim's hand* when it was fired." The Commissioner conceives that Powell's testimony that grabbing a gun around the cylinder gap would cause injury, even tearing of the skin (*see* App. 2403-05), combined with Ard's statement that afterward his hand felt "numb" and that the firing left "little marks" that had gone away between the incident and the trial three years later, disproves Ard's statement that his hand was over the gun's cylinder gap. *See* Pet. at 24; *see* App. at 2227-28, 2262. At best, this provides a weak basis from which the jury could have drawn an inference against Ard's account. There was, however, no probative testimony at trial regarding the presence or absence of injury to Mr. Ard's hand contemporaneous to the incident or after he turned himself in three days later.

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Dated: August 7, 2007

No. 07-33

IN THE
SUPREME COURT OF THE UNITED STATES

JON OZMINT, Director,
South Carolina Department of Corrections,

Petitioner,

versus

JOSEPH LEE ARD

Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the Motion for Leave to Proceed *In Forma Pauperis*, the accompanying *In Forma Pauperis Declaration*, and the *Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of South Carolina* has been served upon counsel for Petitioner by depositing one copy of same in the United States Mail, postage prepaid, addressed as follows:

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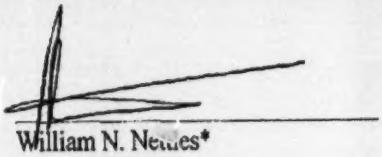
This, the 8th day of August, 2007



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